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Supreme Court of the United States

OCTOBER TERM, 1968

No. 900

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *et al.*, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Date
1967

- July 19 *Certified record* (1 vol. pleadings and transcript),
filed; and cause docketed
- " 31 Statement of Appellant as to contents of appendix
- Aug. 7 Amendment to statement of Appellant as to con-
tents of appendix
- Sep. 11 Twenty copies of Brief for Appellant
- " 11 Twenty copies of Appendix to Brief for Appellant
- Dec. 15 Twenty copies Brief for Appellee
- " 15 Twenty copies of Appendix to Appellee's Brief

Docket Entries

Date
1968

- Feb. 12 Twenty copies Reply Brief for Appellant
- " 12 Twenty copies Opinion of District Court for Northern District of Illinois in Illinois Central Railroad Co. vs. Brotherhood of Railroad Trainmen
- " 12 Twenty copies Opinion in National Railroad Adjustment Board Award No. 7511, First Division
- June 10 Cause argued and submitted (Before: McCree, Combs and Cecil, JJ.) Q-232
- Aug. 1 Four copies opinion of Seventh Circuit in Illinois Central Railroad vs. Brotherhood of Railroad Trainmen (Copies mailed to Court)
- " 16 Letter from counsel for Appellees in response to letter transmitting above opinion of Seventh Circuit (Distributed copies to Court)
- " 29 Four copies of letter from counsel for Appellees citing additional authorities and copy of Opinion of Fifth Circuit in United Industrial Workers of Seafarers, etc. v. Board of Trustees of Galveston Wharves, et al. (Copies distributed to the Court)
- Sep. 3 Letter from counsel for Appellant in reply to letter from counsel for Appellees with reference to Seafarers decisions (Copies distributed to the Court)
- Oct. 7 Judgment of the District Court affirmed Q-394
- " 7 Opinion by Combs, J. 4 pp.
- " 16 Appellee's affidavit of costs
- " 24 Request of Appellant for preparation of record for certiorari petition

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF OHIO

Date	Proceedings
9-23-66	Complaint filed.
9-23-66	Motion for Preliminary Injunction and Notice of Hearing on 9-26-66 at 9:00 A.M. filed.
9-26-66	Minutes of proceedings filed. DJY. Motion for a preliminary injunction continued until 9:00 A.M. on 10-6-66, if possible hearing to be had on permanent injunction.
10-6-66	Minutes of proceedings filed. DJY. Trial to Court begun, in progress, adjourned until tomorrow morning at 9:00 A.M.
10-6-66	Answer and counterclaim of defendants Brotherhood of Locomotive Firemen and Enginemen, H. E. Gilbert and E. F. Gensler filed.
10-7-66	Minutes of proceedings filed. DJY. Trial resumed, in progress, concluded. Defendant's to submit findings of fact and conclusions of law within 10 days; plaintiff has 10 days thereafter to submit exceptions or additions, plaintiff's request for temporary and permanent injunction denied.
10-7-66	Plaintiff's exhibits 1 through 19 inclusive filed.
10-7-66	Defendant's exhibits A through O inclusive, AA through ZZ inclusive and A-A-A and B-B-B filed.
11-1-66	Findings of fact and conclusions of law filed.
11-15-66	Judgment and Decree filed. DJY. Plaintiff shall not have any relief and its complaint is dismissed on the merits as to all defendants. Plaintiff and employees enjoined from establishing or operating certain terminal points as recited in the judgment.
11-23-66	Motion for New Trial by plaintiff filed.

Date	Proceedings
5-12-67	Opinion of the Court filed.
5-12-67	Order denying motion for an order vacating the judgment of this Court 11-16-66 and for a new trial filed. DJY.
6-9-67	Notice of Appeal by Plaintiff filed.

COMPLAINT FOR INJUNCTION

(Filed September 23, 1966)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OHIO, WESTERN DIVISION

No. C-66-207

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,
a corporation, 131 West Lafayette Avenue, Detroit, Michigan,
Plaintiff,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, a
voluntary unincorporated association, 318 Keith Building,
Cleveland, Ohio; BROTHERHOOD OF RAILROAD TRAINMEN, a
voluntary unincorporated association, Standard Building,
Cleveland, Ohio; H. E. GILBERT, individually and
as President of the Brotherhood of Locomotive Firemen
and Enginemen, 318 Keith Building, Cleveland, Ohio;
CHARLES LUNA, individually and as President of the
Brotherhood of Railroad Trainmen, Standard Building,
Cleveland, Ohio; E. F. GENSLER, individually and as General
Chairman of Lodge No. 490 of the Brotherhood of Locomotive
Firemen and Enginemen, 3713 Upton Avenue, Toledo, Ohio,
and WILLIAM UPHAM, individually and as General Chairman
of Lodge No. 512 of the Brotherhood of Railroad Trainmen,
2528 Luddington Drive, Toledo, Ohio, *Defendants.*

1. This is an action for injunction to restrain and enjoin the calling and carrying out of a wrongful and unlawful strike and work stoppage by defendants and those acting in concert with them on plaintiff's railroad in violation of the Railway Labor Act. The wrongful acts and threatened strike as hereinafter described are designed to interrupt commerce and to wrongfully interfere with a management prerogative in the operation of plaintiff's railroad.

2. The jurisdiction of this Court is invoked under the Judicial Code (28 U.S.C. §§ 1331 and 1337), the Interstate

Complaint

Commerce Act (49 U.S.C. §§ 1 seq.), and the Railway Labor Act (45 U.S.C. §§ 151 seq.).

3. Plaintiff is a Michigan corporation with its principal office in Detroit, Michigan and a common carrier of freight in interstate commerce. Plaintiff operates its trains over its line of railroad between Lang Yard in Toledo, Ohio and Detroit, Michigan, and over the lines of other railroads to other points in the State of Michigan. (Plaintiff is sometimes hereinafter referred to as the "Shore Line").

4. Defendant Brotherhood of Locomotive Firemen and Enginemen (sometimes hereinafter referred to as the "Firemen") is a voluntary unincorporated association and labor organization which represents, for the purposes of the Railway Labor Act, the crafts or classes of enginemen and firemen employed by plaintiff. It has its principal office and place of business in Cleveland, Ohio and consists of a grand lodge and subordinate local lodges, including local No. 490, whose members are employed by plaintiff. Defendant H. E. Gilbert is President of the Firemen and he is sued in his own right and as an officer thereof. Defendant E. F. Gensler is General Chairman of Local Lodge No. 490 of the Firemen on the Shore Line. He is sued in his own right and as an officer of Local Lodge No. 490 and as the representative of the members of Local Lodge No. 490 employed by plaintiff who are so numerous as to make it impracticable to bring them all before this Court. Defendant Brotherhood of Railroad Trainmen (sometimes hereinafter referred to as the "Trainmen") is a voluntary unincorporated association and labor organization which represents, for the purposes of the Railway Labor Act, the crafts or classes of trainmen and yardmen employed by plaintiff. It has its principal office and place of business in Cleveland, Ohio, and consists of a grand lodge and subordinate local lodges, including Local Lodge No. 512, whose members are employed by plaintiff. Defendant Charles Luna is President of the Trainmen and he is sued in his own right and as an officer thereof. Defendant William Upham is General Chairman of Local Lodge No. 512 of the Trainmen on the Shore Line. He is sued in his own right and as an officer of Local Lodge No. 512 and as the representative of the members of Local Lodge No. 512 employed by plaintiff who are so numerous as to

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make it impracticable to bring them all before this Court.

5. Plaintiff will begin switching service for the Monsanto Chemical Company plant at Trenton, Michigan on October 1, 1966 under an agreement whereby the Shore Line and the New York Central System alternately serve this plant for a period of one year. In order to realize more efficient and economic operations in service, due to the increase of traffic expected, plaintiff established a new and additional assignment for a local train by Bulletin posted September 19, 1966, effective September 26, 1966, with Trenton (Edison Station) being the terminal point for crews going on and off duty. When last serving this plant in 1965, plaintiff operated a local train under a Bulletin posted December 20, 1962, with DeaRoad, Michigan being the terminal point for crews going on and off duty. The Edison Station at Trenton is located 32.70 miles north of Lang Yard and 11.35 miles south of DeaRoad.

6. On September 20, 1966 defendant E. F. Gensler on behalf of the Firemen threatened plaintiff with a strike beginning September 26, 1966, unless plaintiff cancelled said September 19, 1966 Bulletin.

7. Plaintiff says that it has the unilateral right to establish a new assignment and terminal at Trenton, Michigan, there being no contractual limitations in its collective bargaining agreements with the Firemen and Trainmen.

8. The issue of plaintiff's legal right to unilaterally establish outlying terminals was the subject of a dispute between plaintiff and the Firemen following the posting of a September 24, 1963 Bulletin which established DeaRoad, Michigan as a terminal for a work train. After the dispute was progressed to the highest designated officer of plaintiff, as required by Section 3(i) of the Railway Labor Act, it was submitted to Special Board of Adjustment No. 375 on the Shore Line and, on November 30, 1965, in Award 21, the neutral member ruled that plaintiff had the unilateral right to establish assignments in outlying terminals away from Lang Yard. The arbitrator found that "there is nothing in the rules of agreement which precludes this carrier from establishing an outside assignment." If the Firemen desired to dispute the plaintiff's right to establish a terminal at Trenton by said September 19, 1966 Bulletin, notwithstanding the precedent established in Award 21, then their

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proper remedy was a submission to plaintiff of a claim pursuant to Section 3(7) of the Railway Labor Act and, if and when such claim were declined by the highest designated officer of plaintiff, they could have submitted it to the National Railroad Adjustment Board.

9. Under date of January 27, 1966 the Firemen served a notice under Section 6 of the Railway Labor Act requesting a rule change to the effect that all assignments would originate and terminate at Lang Yard. The proposed rule was rejected by plaintiff during a conference between the parties on February 2, 1966 for the reason that the establishment of outlying terminals was a matter within management's prerogative as held in said Award 21. On May 31, 1966 defendant H. E. Gilbert invoked the services of the National Mediation Board in connection with this dispute and said Board proffered its services on June 1, 1966. Following a formal application by the Firemen, said Board assigned case No. A-7839 to the dispute and advised the parties under date of June 28, 1966 that a mediator would be assigned to mediate the dispute. No mediator has been assigned and the procedures set forth in Section 5 of the Railway Labor Act have not been followed or concluded. By virtue of their failure to exhaust the procedures of the Railway Labor Act, the Firemen are not free to strike, and plaintiff has the legal right to conduct its transportation operations free of any strikes and work stoppages.

10. With reference to the current dispute with the Trainmen, as opposed to the Firemen, representatives of the Trainmen, including defendant William Upham, conferred with a representative of plaintiff on December 16, 1965, over a Section 6 notice dated January 6, 1965, which is unrelated to this dispute, although at the conclusion of this meeting the Trainmen submitted a proposed memorandum of agreement covering the establishment of a terminal at Trenton. The General Manager of plaintiff rejected this proposal under date of January 6, 1966 for the reason that there were no restrictive rules in the collective bargaining agreement which prohibited management from establishing an outlying terminal point and for the further reason that the proposed memorandum of agreement as submitted was too restrictive and contained monetary arbitraries which would make the

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cost prohibitive. The Trainmen did not progress this dispute with the National Railroad Adjustment Board under Section 3(i) of the Railway Labor Act in accordance with their rights, the question being whether the proposed memorandum of agreement submitted December 16, 1965 was a bargainable issue or within management's prerogative, but on September 16, 1966, during a conference between representatives of plaintiff and the Trainmen, a representative of the Trainmen made statements susceptible of a construction that the Trainmen would strike if plaintiff issued said September 19, 1966 Bulletin. On September 23, 1966 plaintiff submitted this dispute ex parte to the First Division of the National Railroad Adjustment Board pursuant to Section 3(i) of the Railway Labor Act which is vested with exclusive jurisdiction. The Trainmen have not served a notice of any intended change in agreements upon plaintiff under Section 6 of the Railway Labor Act with regard to this dispute over the proposed memorandum of agreement submitted December 16, 1965. By virtue of their failure to follow the provisions of the Railway Labor Act, the Trainmen are not free to strike, and plaintiff has the legal right to conduct its transportation operations free of any strikes and work stoppages.

11. Although plaintiff rejected the memorandum of agreement submitted by the Trainmen on December 16, 1965 and the proposed rule submitted by the Firemen on January 27, 1966, the General Manager of the Shore Line has nevertheless made every reasonable effort to settle these disputes without success. In this connection, on January 24, 1966, plaintiff extended an invitation to representatives of all of the operating unions to participate in an inspection of the proposed welfare facilities at Trenton. A meeting was held on February 3, 1966 and attended by representatives of the Firemen and Trainmen (representatives of the Order of Railway Conductors and Brakemen on the Shore Line did not attend and have not engaged in any dispute with plaintiff on this issue). On the following day, the General Manager of plaintiff wrote to these representatives enclosing a copy of a blueprint for the proposed facilities and requesting their advice as to whether or not they wished any changes made. On June 7, 1966 the General Manager of plaintiff

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again wrote to representatives of the operating unions and advised them that the Shore Line was proceeding with the construction of facilities at Trenton and that it intended to establish new and additional road assignments with the terminal at that point no later than October 1, 1966. A building has since been constructed opposite the Edison Station for welfare and bunkroom facilities for crews going on and off duty at that terminal.

12. Plaintiff is and has at all times been ready, willing and able to handle disputes with the Firemen and Trainmen according to agreements between them and the procedures of the Railway Labor Act, and has complied with all procedures and obligations incumbent upon it. Plaintiff has no adequate remedy at law.

13. The uninterrupted services of plaintiff's employees represented by defendants are essential to the operation of plaintiff's railroad. The threatened strike will cause plaintiff many thousands of dollars of damage daily and the diversion of substantial traffic with consequent loss of revenue. The threatened strike will cause plaintiff to lay off other employees, who are not involved in any dispute with plaintiff or represented by defendants, and will cause substantial and irreparable damage to plaintiff, to industries and connecting carriers, their employees and customers, and to the general public.

14. The granting of the relief sought herein will cause but slight injury, if any, to defendants, as compared with the substantial injury which will be caused by the threatened strike to plaintiff, to industries and connecting carriers, their employees and customers, and to the general public.

WHEREFORE, plaintiff prays the Court for a preliminary injunction to be made permanent on final hearing:

enjoining defendants and all persons acting in concert with them from calling and carrying out a strike and work stoppage on plaintiff's railroad; and

directing the defendants forthwith to take all steps within their power to prevent the commencement or the continuation of a strike and work stoppage.

Complaint

Dated September 23, 1966 at Toledo, Ohio.

/s/ JOHN M. CURPHEY,
/s/ ROBISON, CURPHEY & O'CONNELL,
425 L-O-F Building
Toledo, Ohio
Ch-1-2237

Attorneys for Plaintiff.

STATE OF OHIO,
County of Lucas ss.

C. J. McPhail, being first duly sworn, says that he is the General Manager of The Detroit and Toledo Shore Line Railroad Company, that he has read the foregoing Complaint and that the statements contained therein are true and correct.

/s/ C. J. McPhail.

Sworn to before me and subscribed in my presence this 23rd day of September, 1966.

/s/ JOHN M. CURPHEY.

JOHN M. CURPHEY, Attorney at Law.
Notary Public, State of Ohio.
My commission has no expiration date.
Section 147.03 R. C.

**ANSWER OF DEFENDANTS BROTHERHOOD OF
LOCOMOTIVE FIREMEN AND ENGINEMEN, H. E.
GILBERT, AND E. F. GENSLE.**

(Filed October 6, 1966)

[Title omitted in printing.]

Now come the defendants Brotherhood of Locomotive Firemen and Enginemen, H. E. Gilbert and E. F. Gensler, and for their answer to the complaint of plaintiff state as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted against these defendants.

Second Defense

The Court lacks jurisdiction of the subject matter of the action.

Third Defense

The Court is without jurisdiction to grant injunctive relief herein by virtue of the provisions of the Norris-LaGuardia Act (29 U.S.C., Sec. 101 et seq.).

Fourth Defense

For their answer to the particular allegations of the complaint, these defendants aver and allege as follows:

1. These defendants admit that the action purports to be brought for the purposes alleged in paragraph 1 of the complaint, but otherwise deny each and every allegation contained in said paragraph.

2. These defendants deny the existence of jurisdiction in this Court as invoked in paragraph 2 of the complaint, and allege further that the Court has been deprived of jurisdiction to entertain this action by virtue of the provisions of the Railway Labor Act (45 U.S.C. Sec. 151 et seq.), and the Norris-LaGuardia Act (29 U.S.C., Sec. 101 et seq.).

3. The allegations contained in paragraph 3 of the complaint are admitted.

4. The allegations contained in paragraph 4 of the complaint are admitted.

Answer of BLF & E, et al.

5. With respect to the allegations contained in paragraph 5 of the complaint, it is admitted that plaintiff has an agreement to begin switching service for the Monsanto Chemical Company plant at Trenton, Michigan, on October 1, 1966; that plaintiff posted a bulletin on September 19, 1966, as described in said paragraph; and that the Edison Station at Trenton is located as therein described; but these defendants deny each and every other allegation contained in said paragraph 5.

6. These defendants deny the allegations contained in paragraph 6 of the complaint.

7. The answering defendants admit that the plaintiff has the unilateral right to establish a new assignment and terminal at Trenton, Michigan, assuming there are no contractual limitations on the subject contained in the plaintiff's collective bargaining agreements with the Firemen and Trainmen, and provided the establishment of new assignments and terminals is not the subject matter of current collective bargaining efforts, and/or the subject of mediatory efforts by the National Mediation Board, as hereinafter set forth in the counterclaim filed herein.

8. With respect to the allegations contained in paragraph 8 of the complaint, the right of the plaintiff to unilaterally establish an outlying home terminal or an outlying assignment was not the subject of the dispute between plaintiff and the Firemen following the posting of a September 24, 1963 Bulletin by plaintiff. The Bulletin of September 24, 1963, proposed operating a work train out of Dearoad, Michigan which was an established terminal for hostling and puller jobs only, and the propriety of the plaintiff unilaterally establishing that work assignment out of Dearoad was submitted to Special Board of Adjustment No. 375, and was decided in Award No. 21, as is set forth in said paragraph 8, but except as herein admitted, these defendants deny the allegations of paragraph 8.

Further answering said paragraph 8, these defendants say that plaintiff is currently prohibited by the provisions of the Railway Labor Act from establishing a terminal at Trenton as set forth in the September 19, 1966, Bulletin, by virtue of the pendency of proceedings initiated by this defendant Brotherhood under Section 6 of said Act seeking a change in its agreement with plaintiff whereby plaintiff

Answer of BLF & E, et al.

would be precluded from establishing such terminal at Trenton, and the requirement of said Section 6 calling for maintenance of the *status quo* by plaintiff carrier until the controversy has been finally acted upon pursuant to Section 5 of the Railway Labor Act; that the services of the National Mediation Board have been invoked in said Section 6 proceeding and the matter docketed by the Board as its Case No. A-7839, and that said case is presently pending awaiting assignment of a mediator by said Board; and that the question of plaintiff's right to put into effect its September 19, 1966, Bulletin is not a matter within the jurisdiction of the National Railroad Adjustment Board.

9. With respect to the allegations contained in paragraph 9 of the complaint, these defendants deny that the establishment of outlying terminals is a matter within management's prerogative and deny that said Award 21 so held, and deny that plaintiff has the legal right to conduct its transportation operations free of any strikes and work stoppages when, as hereinabove set forth, its conduct of such operations includes a violation by it of the mandatory requirements of Section 6 of the Railway Labor Act; but the remaining allegations of said paragraph 9 are admitted.

10. These defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 10 of the complaint, and hence deny the same for want of such knowledge or information.

11. With respect to the allegations contained in paragraph 11 of the complaint, it is admitted that on January 24, 1966, plaintiff extended an invitation to representatives of all of the operating unions to participate in an inspection of the proposed welfare facilities at Trenton; that a meeting was held on February 3, 1966, and attended by representatives of the Firemen and Trainmen; that on the following day, the General Manager of plaintiff wrote to these representatives enclosing a copy of a blueprint for the proposed facilities and requesting their advice as to whether or not they wished any changes made; that on June 10, 1966 (not June 7, as alleged), the General Manager of plaintiff again wrote to representatives of the operating unions and advised them that the Shore Line was proceeding with the construction of facilities at Trenton and that it intended to establish new

Answer of BLF & E, et al.

and additional road assignments with the terminal at that point no later than October 1, 1966; and that a building has since been constructed opposite the Edison Station for welfare and bunkroom facilities for crews going on and off duty at that terminal but these defendants deny each and every other allegation contained in said paragraph 11.

12. These defendants deny the allegations contained in paragraph 12 of the complaint.

13. These defendants deny the allegations contained in paragraph 13 of the complaint.

14. These defendants deny the allegations contained in paragraph 14 of the complaint.

Fifth Defense

Plaintiff has failed to comply with the *status quo* provisions of Section 6 of the Railway Labor Act in connection with the processing of National Mediation Board Case No. A-7839, as set forth above and in paragraph 9 of the complaint herein, and is precluded by the provisions of the Norris-LaGuardia Act, and particularly Section 8 thereof (29 U.S.C. Sec. 108), from obtaining the relief sought herein or any injunctive relief in the premises.

WHEREFORE, having fully answered plaintiff's complaint for injunction herein, these defendants pray that the same be denied and dismissed, and that they may have their costs herein and such other relief as the Court may deem appropriate.

Counterclaim

For their counterclaim against plaintiff, these defendants allege and aver as follows:

1. These defendants adopt and incorporate as if fully repeated herein all of the affirmative allegations and averments in their foregoing answer to plaintiff's complaint.

2. Plaintiff threatens to and will, unless enjoined by this Court, place into effect immediately its Bulletin of September 19, 1966, establishing a terminal at Trenton, Michigan, as well as additional bulletins which it plans and intends to issue creating additional train assignments at Trenton in connection with its proposed switching service for the Monsanto Chemical Company plant.

Answer of BLF & E, et al.

3. Said establishment and expansion of a terminal at Trenton, Michigan, by plaintiff would constitute a violation of the requirements of Section 6 of the Railway Labor Act to the effect that rates of pay, rules or working conditions involved in the aforementioned National Mediation Board Case No. A-7839 shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 and other Sections of the Railway Labor Act.

4. Said action by plaintiff will cause substantial and irreparable hardship and damage to employees of plaintiff represented by these defendants, for which they have no adequate remedy at law, in that such employees would be required to report for work at a point many miles distant from their homes and their present place of reporting, without additional compensation for time and travel expense, and without the protection of any agreement governing their facilities and welfare at a new and different home terminal, and would further subject them to the hazards and hardships of many miles of highway travel to and from work each day.

WHEREFORE, these defendants pray that the Court enjoin plaintiff, its employees, agents, or representatives, from giving effect to the aforesaid Bulletin of September 19, 1966, and from any other acts or actions effecting or implementing the establishment of a terminal at Trenton, Michigan, until such time as the requirements of the Railway Labor Act for the processing of National Mediation Board Case No. A-7839 have been fully complied with and exhausted.

MULHOLLAND, HICKEY & LYMAN

By Richard B. Lyman

741 National Bank Building

Toledo, Ohio 43604

HEISS, DAY AND BENNETT

By Russell B. Day

622 Keith Building

Cleveland, Ohio 44115

*Attorneys for Defendants Brotherhood
of Locomotive Firemen and Enginemen,
H. E. Gilbert, and E. F. Gensler*

Dated October 5, 1966 at Toledo, Ohio

TRANSCRIPT OF TESTIMONY

(October 6, 1966)

[3] PLAINTIFF'S EVIDENCE

The COURT: Are you ready to proceed with the introduction of evidence?

Mr. CURPHEY: Yes, your Honor. If your Honor please, we shall call as our first witness Mr. William Upham, for cross examination under Rule 43.

The COURT: Very well. He may come forward and be sworn.

THEREUPON, the Plaintiff called as a witness for cross examination, Mr. WILLIAM J. UPHAM, who, having been previously duly sworn by the Clerk, testified as follows:

CROSS EXAMINATION.

By Mr. JOHN M. CURPHEY:

Q. State your full name and address, please.

[4] A. William Joseph Upham, 2528 Luddington, Toledo, Ohio.

Q. You are a defendant in this case, Mr. Upham?

A. I am.

Q. And are you the general chairman of the Brotherhood of Railroad Trainmen on the Shore Line?

A. I am.

Q. How long have you worked for the Shore Line?

A. Since February 29, 1952.

Q. What is your present assignment, if any?

A. Yard helper.

Q. You work off the extra board a lot, do you?

A. No, very seldom.

Q. How long have you been general chairman?

A. Since about November of 1964, I think it was.

Testimony of William J. Upham

Q. Did you hold any office in the organization prior thereto, Mr. Upham?

A. Yes. At one time I was chairman for a year, and then I held the vice chairman's office prior to being chairman.

Q. When was it that you were chairman for a year, prior to your present office?

A. In 1955 and 1956.

Q. Prior thereto you say you were vice chairman for one year, is that true?

[5] A. No; in 1964 I was vice chairman.

Q. What is your present intent as general chairman with respect to a strike if the Shore Line posts a bulletin like the September 19, 1966, bulletin?

A. Well, my intent would be follow the steps that are provided for us by law.

Q. Well, specifically, what do you intend to do?

A. In what respects? I mean, what do I intend to do what?

Q. Do you intend to strike or not to strike?

A. I intend to negotiate an agreement, but if that can't be done, then I would, then I would have a strike if at all possible.

Mr. CURPHEY: If your Honor please, I should like to ask the Court to instruct the witness to answer the last question put to him.

Mr. LYMAN: He has answered the question.

Mr. CURPHEY: I don't think he has. I think he has evaded it.

The COURT: I think he has answered the question. He said he intends to negotiate if he can, and if he can't negotiate an agreement he will strike if it is possible to strike. I don't know what other answer [6] he could give.

Q. (By Mr. Curphey—Continuing) Now, Lang Yards is the home terminal of the Shore Line, isn't it?

A. Yes.

Q. And also there is a terminal at DeRoad, is there not, Mr. Upham?

A. There is at this time one at DeRoad, but it is under dispute whether it is the home terminal or not.

Testimony of William J. Upham

Q. Well, there is a terminal at DeRoad?

A. Yes.

Q. This terminal was established on December 20, 1962, is that true?

A. I believe that is true, yes, sir.

Q. Now, Trenton is north of Lang Yard, is that correct?

A. That is correct.

Q. About how far is it?

A. Somewhere around 35, 37 miles.

Q. And DeRoad in turn is north of Trenton by approximately eleven miles, is that right?

A. Approximately.

Q. Have you worked any assignments at DeRoad?

A. Yes, I have.

Q. You mentioned in response to one of my previous questions that [7] that matter of DeRoad is presently in dispute, is that right?

A. I did.

Q. Following the establishment of that terminal at DeRoad the Shore Line initiated a taxicab service, is that true?

A. That's true.

Q. And crews that reported to work at DeRoad were moved by taxicab south to Trenton; is that how it worked out in practice, Mr. Upham?

A. That's right.

Q. They went on duty at DeRoad, is that correct?

A. That is correct.

Q. And then the railroad moved the crew by taxicab down to Trenton, correct?

A. That is correct.

Q. And then when the men got off duty after working at Trenton they went back by taxicab to DeRoad, is that correct?

A. Yes.

Q. And they reported off duty at DeRoad?

A. Correct.

Q. And that matter is in dispute, is that true?

A. That's correct.

Q. You in fact served a Section 6 notice on January 6, 1965, [8] protesting that taxicab service, did you not?

Testimony of William J. Upham

A. I did.

Q. And that dispute is currently in mediation, true?

A. True.

Q. You object to the taxicab service in a general way?

A. Yes.

Q. And that is the purpose of your Section 6 notice?

A. On the conditions covering the whole situation.

Q. Very well. Now, with regard to this assignment at DeRoad the Trainmen for the most part I take it drive their personal automobiles up to DeRoad, is that true?

A. That's correct.

Q. Now, did you have a conference with representatives of the plaintiff on behalf of the Trainmen with regard to pending disputes in the latter part of 1965?

A. I might have; in all probability I did.

Q. More specifically, did you participate in a conference beginning on December 14, 1965?

A. Yes.

Q. And who was present at that conference on behalf of the Trainmen?

A. Vice president Montgomery, vice chairman Ritchie, and then myself.

[9] Q. What is the name of the present vice president of the Trainmen?

A. The one assigned to our property at the present time?

Q. Yes.

A. James Burke.

Q. Mr. Montgomery is no longer assigned to the property, I take it?

A. That is correct.

Q. Who was present at this conference on behalf of the railroad?

A. Mr. Donald Vane, the labor relations officer.

Q. Where was this conference held?

A. In the offices of the Shore Line Railroad Company in Detroit, Michigan.

Q. I take it there were several matters for discussion during the course of that conference, is that true?

A. That's true.

Q. There had been formal notice given as to those matters?

Testimony of William J. Upham

A. That's true.

Q. Did you have a regular agenda you followed?

A. Yes.

Q. And this conference took place over a period of three days beginning on the 14th, did it not?

[10] A. That's correct.

Q. Do you recall now how many different disputes concerning Section 6 notices you had under discussion at that conference, Mr. Upham?

A. No.

Q. Well, this taxicab matter was one of the matters up for discussion, was it not?

A. It was.

Q. Now, toward the conclusion of the second day of this conference did you inquire of Mr. Vane if he would be willing to discuss the establishment of a terminal at Trenton during the conference?

A. Yes.

Q. And he indicated that he would be willing to do so, did he not?

A. He did.

Q. And there had not been given any formal notice prior to that on this subject, had there?

A. The formal notice was given for the taxicab Section 6 notice, and during the discussion of this taxicab matter the subject was brought up as to establishing a terminal at Trenton, Michigan.

Q. I appreciate what you say, but my question is, there wasn't [11] any formal notice of a conference with regard to this particular subject of the establishment of a terminal at Trenton, was there?

A. No.

Q. It was not in fact on the agenda before the meeting, was it, sir?

A. No.

Q. And that, of course, is why you asked Mr. Vane if he would be willing to discuss it, is that right?

A. No.

Q. Well, you did ask Mr. Vane if he would be willing to discuss the matter, didn't you?

A. Yes, I did.

Testimony of William J. Upham

Q. And he indicated that he would be willing to discuss the matter, didn't he?

A. That's true.

Q. And then on the following day you submitted to him a proposed memorandum of agreement covering the establishment of a terminal at Trenton, is that correct?

A. That's correct.

Q. Was there any letter of transmittal that accompanied this memorandum?

A. No.

[12] Q. Was this at the conclusion of the scheduled conference that you submitted the memorandum?

A. It was the last item that we dealt with.

Q. And I suppose you discussed it briefly with Mr. Vane, did you not?

A. We did.

Q. After which the meeting was adjourned, is that true?

A. That's true.

Q. Now, when submitting this memorandum to Mr. Vane at the close or near the close of your conference on the third day did you make any reference to the joint Section 6 notice of April 28, 1961, or Mediation Case No. 6755?

A. No.

Q. You did not intend at that time, did you, Mr. Upham, to reopen the negotiations as to Mediation Case 6755?

A. No.

Q. Now, this memorandum was rejected as submitted by the general manager of the plaintiff thereafter, wasn't it?

A. Yes.

Q. And that was under date of January 6, 1966? Or do you remember the date?

A. I believe that was the date.

Q. But it was rejected in writing?

[13] A. It was rejected in writing.

Q. Did you acknowledge that rejection of his, do you recall, Mr. Upham?

A. I believe I did.

Q. Did you write him a letter on the subject?

A. I believe I wrote a letter on February 13th something to that effect, where I acknowledged the conference on the taxicab and the proposed memorandum of agreement.

Testimony of William J. Upham

Q. Did the letter you just referred to in your testimony also contain a strike threat?

A. I would have to read the letter before I could answer that, sir.

Q. Well, I am going to show you a letter at this time to refresh your recollection,—

Mr. CURPHEY:—(Continuing) And I might say to opposing counsel that I am not going to mark it now, but I will later and introduce it in evidence,—

Q. (By Mr. Curphey—Continuing)—which purports to be a letter written by you under date of February 13th, Mr. Upham.

Now, with reference to this letter, Mr. Upham, is this the letter you had previous reference to in response to my question?

A. Yes, sir.

[14] Q. Now, in this letter you advised the railroad that it was the intent of your organization to withdraw from service on February 17, 1966, is that true?

A. That's true.

Q. And there were two matters in dispute, one this so-called taxicab matter, and secondly, the proposed memorandum of agreement of December 16, 1965, is that correct?

A. The taxicab is the notice that the proposed memorandum of agreement was bargaining material, and I enclosed it in the letter.

Q. I see. And then it is your testimony that, essentially, this communication had to do with the Section 6 notice of January 6, 1965, with reference to the taxicab dispute, is that correct?

A. That's correct.

Q. And this point-4 referring to the memorandum submitted on December 16th was merely bargaining material in connection with that other dispute?

A. Right.

Q. And subsequent to this, the services of the Mediation Board were invoked, were they not?

A. True.

Q. And there was no strike and the matters continued in the [15] status quo, is that correct?

Testimony of William J. Upham

A. Yes.

Q. Now, of course, in this communication, there is no reference to this old Joint Section 6 notice of April 28, 1961, or Mediation Case No. 6755, is there?

A. No.

Q. Now, when the Board took jurisdiction of this taxicab matter—and I believe they did on that occasion, did they not?

A. I believe they did.

Q. That is Case No. 7711?

A. Right.

Q. They, of course, did not include in that case this point-4, or proposed memorandum of agreement submitted on December 16, 1965, did they?

A. No, they didn't.

Q. There was no Section 6 notice with reference to that, was there?

A. No, not with reference to that.

Q. That was a separate matter, was it not?

A. Yes.

Q. You included that for bargaining purposes, you said, and the procedures have not been exhausted with reference to this particular dispute, or have they?

[16] A. No.

Q. Now, of course, if the Shore Line Railroad did in fact establish this terminal at Trenton that would have quite an effect upon the taxicab dispute, would it not?

A. Yes, it would.

Q. Now, at about this time Mr. McPhail invited you and others to inspect the proposed facilities at Trenton, didn't he, Mr. Upham?

A. Yes; somewhere around February 3rd.

Q. And did you participate in that inspection?

A. Yes, I did.

Q. And you were thereafter asked to make any suggestions you wanted in writing, were you not?

A. Yes.

Q. Did you in fact make any?

A. No, I didn't.

Q. The Shore Line Railroad Company has built those facilities, haven't they?

Testimony of William J. Upham

A. Not the ones they proposed to make.

Q. Oh. There has been a substantial change, is that correct, Mr. Upham?

A. That's correct.

Q. Have you registered any complaint in that respect?

[17] A. No.

Q. The establishment of these facilities was, of course, one of the conditions set forth in your memorandum of December 16, 1965, wasn't it?

A. I believe it was.

Q. Now, you learned thereafter—in the Spring of the year—that the Shore Line Railroad intended to go ahead and establish a terminal at Trenton, did you not?

A. I did.

Q. And when was it that your organization decided that they would strike if and when such a bulletin was posted?

A. Well, the decision, I don't know, but it was later on in the year.

Q. And when was that, approximately?

A. Sometime in December—or September.

Q. But you had some discussions in the summer, didn't you, with the vice president or the Trainmen on this subject?

A. I believe there was a meeting, yes.

Q. And at that meeting it was decided to write a letter asking for a conference on this Mediation Case No. 6755, wasn't it?

A. That's true.

Q. And that letter was in fact written on August 12, 1966, [18] wasn't it?

A. I believe that is the date of it.

Q. And the railroad, of course, agreed to meet with you, didn't they?

A. Yes.

Q. And that conference was held on September 16th, finally?

A. That's correct.

Mr. CURPHEY: I believe that's all. Thank you, Mr. Upham.

The COURT: You may stand down, Mr. Upham.

Mr. LYMAN: May I have the opportunity to ask a few questions at this time, your Honor, pending our right to recall the witness?

Testimony of William J. Upham

The COURT: Our procedure does not provide for redirect after cross examination under the Rule.

Mr. LYMAN: I see, your Honor.

The COURT: You may reserve your redirect examination until your own case.

Mr. LYMAN: Thank you.

The COURT: You may now call your next witness, Mr. Curphey.

[19] Mr. CURPHEY: Thank you, your Honor.

We will call Mr. McPhail as our next witness, your Honor.

The COURT: He may be called and sworn.

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Testimony of Clayton J. McPhail

THEREUPON, the Plaintiff called as a witness, MR. CLAYTON J. MCPHAIL, who, having been previously duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION.

By Mr. JOHN M. CURPHEY:

Q. Will you state your full name and address, please?

A. Clayton J. McPhail, 17130 Kinross, Birmingham, Michigan.

Q. And your position, sir?

A. General Manager.

Q. Of what company?

A. The Detroit & Toledo Shore Line Railroad Company.

Q. You signed the Complaint in this case, did you not, Mr. [20] McPhail?

A. Yes, sir.

Q. Is that a true and correct statement?

A. It is.

Q. Will you describe briefly for the Court here the property of the Shore Line?

A. Generally speaking, the property of the Shore Line Railroad runs approximately fifty miles, beginning at its southernmost point in Toledo, up to DeRoad, Michigan.

We run through trains and local switchers. We have stations along the line. We employ approximately 350 people. Our general offices are located at Detroit, Michigan.

Our principal areas of work—or our principal area of work is concerned with Lang Yard in Toledo.

Q. How many daily trains do you have?

A. The Shore Line Railroad operates four daily through trains, customarily daily trains, and four local switch runs.

We also operate what is commonly known as a “puller” assignment between our Lang Yard in Toledo and the Stanley Yard of the New York Central in Toledo.

Q. In what areas do you have switching operations where you can make up trains?

A. Our switching operations are primarily concerned with four [21] points. Our major one is at Lang Yard in Toledo. We also have switching operations at Monroe, which

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is our next station to the north. And, continuing on in a northerly direction, we perform service at Rockwood, Trenton and DeRoad Yard in Detroit, or River Rouge.

Q. Where is the location of the Monsanto plant which you serve, Mr. McPhail?

A. The Monsanto plant is located adjacent to our Edison Yard in Trenton, Michigan.

Q. And will you give us a brief history of your current service of this plant?

A. Well, the Shore Line Railroad has for many years exclusively served the Monsanto Company. However, approximately in 1960 Monsanto served notice upon the Shore Line Railroad that they desired to have an additional carrier serve them, and they expressed the desire to have the New York Central do so.

Accordingly, we negotiated an agreement with the New York Central whereby we would switch the Monsanto Company plant on an every-other-year basis, and that arrangement started in 1961. That has continued and still continues at the present time.

Q. And under that agreement was it this year that you proposed to commence that switching?

[22] A. The New York Central terminated their switching operations at Monsanto at the end of September, and we took over on October 1, 1966.

Q. Are there other customers in the Trenton area served by the Shore Line?

A. Yes, there are, there are three or four.

Q. Could you name them for us, please?

A. Well, Schwewnigan is located at that point, and The Detroit Edison Company is a large shipper and receiver of freight at that point as well as Niemann's Lumber Company. Then, too, Lever Brothers is located at Trenton, and that is approximately the extent of it in the immediate Trenton area adjacent to the Edison Yard.

Q. Now, Mr. McPhail, what brought about last month this immediate dispute with the Trainmen on the Shore Line Railroad Company?

A. The posting of the bulletin dated September 19, 1966, by the carrier.

Q. And what was the subject matter of the dispute?

Testimony of Clayton J. McPhail

A. The establishment of a terminal at Trenton.

Q. And were there working conditions involved in this subject matter of dispute?

A. That naturally followed, the conditions under which [23] the employees desired to impose upon the carrier at this point.

Q. Had the Trainmen submitted any proposals to you in that connection?

A. Yes, they did.

Q. And when were these proposals submitted?

A. On December 16, 1965,—

Q. In what form?

A. (Continuing)—when the memorandum of agreement was submitted to us that has already been discussed.

Q. How was this memorandum of agreement treated by you when received?

A. Well, in the only manner we could treat it: as a new dispute.

Q. What was subsequently done?

A. The dispute was referred to the First Division of the National Railroad Adjustment Board, under the advice of counsel.

Q. What was done, if anything, immediately or shortly after the memorandum was submitted to you?

A. Well, the carrier rejected the agreement as submitted, and then of course we took the dispute to the National Railroad Adjustment Board.

Q. And that is its present status, I take it?

A. Yes, sir.

[24] Q. Now, Mr. McPhail, have there been related disputes over this Trenton terminal over the years? Have there?

A. Yes, there have been.

Q. Beginning when?

A. In 1961, when the original notice was served.

Q. And what was contemplated by the Shore Line at that time with respect to this terminal?

A. Well, at that time, in 1961, we were operating four runs, four switch runs out of Lang Yard in Toledo. And of course in 1960 and continuing into 1961 our revenues took a rather drastic drop, and because of the considerable

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amount of overtime consumed by these crews in going from Lang Yard in Toledo to their point of principal switching it was decided that we should transfer two assignments to an outlying point, and we intended to do so at Trenton, Michigan.

Q. And, specifically, what were those two assignments, Mr. McPhail?

A. They were 401-402, and 407-408.

Q. Now, did this contemplated change become the subject of a dispute with the operating employees?

A. Yes, it did.

Mr. CURPHEY: If your Honor please, I would like to take a break for the benefit of the Clerk [25] at this time. Perhaps we can expedite these matters if I have him mark all the exhibits I propose to offer at one time. I've got them in order.

The COURT: You want to take a brief recess at this time then?

Mr. CURPHEY: Yes, your Honor, I do. I think a five-minute recess would serve the purpose and be sufficient.

The COURT: Very well. Court will be in recess.

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Mr. CURPHEY: If your Honor please, I have another set of the exhibits that I propose to now identify, and I would be glad to give them to your Honor for his ready reference if you would care to have them. It might expedite matters a little further.

There is a little number in the upper right-hand corner of the corresponding numbers that the Clerk has marked on them.

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[26] Q. (By Mr. Curphey—Continuing) I hand you, Mr. McPhail, what has been marked Plaintiff's Exhibit 1 and ask you to identify that, please.

A. This is a letter dated April 28, 1961, addressed to myself and constituting a formal Section 6 notice under the provisions of the Railway Labor Act to negotiate an agree-

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ment of conditions covered by the contemplated setting up of this tieup point, and it is served jointly by the general chairman of the RC & B, the BR & O, and the BF & E.

Q. Thank you. Were conferences subsequently held pursuant to this notice?

A. Yes, there were.

Q. What were the results of those conferences?

A. Well, the conferences on that specific Section 6 notice were not productive simply because the notice was extremely vague, and the organizations requested additional time to prepare a proposed memorandum of agreement to cover what they referred to as "the contemplated change."

Q. Was this request granted?

A. Yes, it was.

Q. Did you subsequently receive a proposed memorandum of agreement submitted under this Section 6 notice?

A. Yes, I did.

[27] Q. Do you recall whether there was a letter of transmittal accompanying this proposal?

A. Yes, I believe there was.

Q. I will hand you what has been marked Plaintiff's Exhibit 2, Mr. McPhail, and I will ask you to identify that document for us, please.

A. This is a letter dated June 8, 1961, addressed to myself wherein it—which actually constitutes a letter of transmittal and transmits a written proposal in connection with the Section 6 notice.

Q. How was the dispute characterized in that letter of transmittal, Mr. McPhail?

MR. LYMAN: I object to that, your Honor. The letter speaks for itself.

Q. (By Mr. Curphey—Continuing) I hand you what has been marked Plaintiff's Exhibit 3, Mr. McPhail, and would you please identify that for us?

A. This is the proposed memorandum of agreement that accompanied the letter of transmittal. And it, of course referred to the desire to change the present home terminal of these trains, to operate them out of Edison from Lang.

Q. Were there any subsequent proposals submitted by

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the operating units, or unions, following your receipt of this [28] exhibit?

A. Not to my knowledge from the organizations.

Q. What subsequently happened then, Mr. McPhail, with regard to this dispute?

A. Well, because of our failure to reach an agreement on this proposal as submitted the conferences on the property were terminated, and subsequently the organizations invoked the services of the National Mediation Board, and this was docketed as Case No. A-6755.

Q. Then what happened?

A. And subsequently it was negotiated, again on the property, with the assistance of one or more mediators.

However, again it was unproductive and did not result in the consummation of an agreement.

Q. Did this take place during the remainder of 1961, for the most part?

A. Yes.

Q. What did the carrier then do, if anything, with regard to the changes contemplated by the notice and the transfer of the two local trains, 401-402 and 407-408?

A. Well, at that particular time we did very little. However, subsequently we changed the operation of the locals. So that two of them were established at DeRoad, which was a closer [29] point to Trenton than was Lang Yard.

Q. Following your unsuccessful conferences on the property, Mr. McPhail, what action did the National Mediation Board take, if any?

A. Well, the National Mediation Board indicated that they could not get the parties to reach an agreement. And, of course, in accordance with the Railway Labor Act, they offered arbitration.

The organizations refused arbitration. And, of course, the carrier took the position that the issue was moot at the time because we did not contemplate any longer the changing of these two assignments from Toledo to Trenton, and we therefore declined to receive a proffer of arbitration.

Q. All right. Now, Mr. McPhail, I hand you what has been marked Plaintiff's Exhibit 4 and ask you to identify that document, please.

A. Exhibit 4 is a letter dated April 3, 1963, addressed to

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myself as well as the president of the Brotherhood of Locomotive Firemen & Enginemen, and the president of the Brotherhood of Railroad Trainmen, setting out the Section 6 notice, and in effect—and in its statement stating that the case was closed on April 3, 1963.

Q. Now, subsequent to this letter and the Board closing its [30] file, Mr. McPhail, did you have any conferences with regard to this matter?

A. No, sir, there have been negotiations, no conferences.

Q. Did you have any conferences on the matter last month, Mr. McPhail?

A. Yes, sir.

Q. Did you have subsequent—did you have any conferences subsequent to April 3, 1963, except for the one last month?

A. No, sir, not in the interim period.

Q. Now, during the mediation of this dispute, Mr. McPhail,—and I think that perhaps you touched on this in response to one of my previous questions—will you state whether or not the Shore Line Railroad Company established a terminal at DeRoad for a local train?

A. Yes, we did.

Q. And when was that, if you recall?

A. If I am recalling correctly, it was in 1962.

Q. Would that have been the latter part of—

A. (Interposing) The latter part of 1962, yes, sir.

Q. Was this considered by the parties within the scope of the joint Section 6 notice of April 28, 1961?

Mr. LYMAN: I object to that question, your Honor. He can't speak for all of the parties, [31] as to what the various parties considered something to be.

The COURT: Sustained.

Q. (By Mr. Curphey—Continuing) Was that considered by you, Mr. McPhail, as being within the scope of the joint Section 6 notice of April 28, 1961?

A. No, sir.

Q. Now, what subsequently occurred in connection with this assignment and the service of the Monsanto Company plant at Trenton?

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A. Well, as we alternated with the New York Central in serving the Monsanto Company plant, we changed our operations to conform with that switching requirement.

Inasmuch as we were in controversy as to the assignment of crews at Trenton, we assigned crews at DeRoad, and for some time we had the crews using an engine and locomotive together between DeRoad and Trenton.

However, that proved to be somewhat time consuming, and we subsequently went to a taxicab arrangement. That was in the fall or late 1964, and during 1965, while we were at the plant switching Monsanto.

Q. Now, did this taxicab service develop any protest from the Trainmen?

A. Yes, it did.

[32] Q. And was a dispute initiated in due course?

A. Yes, there was.

Q. Is there a pending Section 6 notice with regard to that matter?

A. There is.

Q. What is the status of that?

A. The status of that at the present time is that we are awaiting a mediator.

Q. Now, with reference once again to the joint Section 6 notice of April 28, 1961, and Mediation Case No. 6755 involving the contemplated change of these two trains, were the Firemen a party to those mediation proceedings?

A. They were when the Section 6 notice was served in 1961.

Q. Were they a party to the subsequent mediation proceedings, Mr. McPhail?

A. Yes, sir.

Q. And subsequent to the Board closing its file, as noted, —and what has been identified as Plaintiff's Exhibit 4— what did the Firemen do, if anything, with regard to this matter?

A. Well, the Firemen originally joined in the negotiations as a result of the Section 6 notice. Later on, however, they took the position that there were claims pending because of the establishment of assignments at DeRoad.

[33] They further told us at a later time that they were going to withdraw from the Section 6 notice of 1961, inas-

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much as a dispute involving the establishment of trains at DeRoad was going to be a matter to be decided by a Special Board of Adjustment. And they subsequently withdrew from the Section 6 notice and wrote us a letter telling us that they were withdrawing and saying in effect that the decision on those particular cases to be decided by the Special Board of Adjustment would undoubtedly settle the issue as to whether or not the carrier had the right to establish outlying points.

Q. Now, you have referred in your answer to a Special Board of Adjustment, Mr. McPhail.

A. Yes.

Q. Will you explain briefly for the benefit of the Court what that Board is?

A. The Special Board of Adjustment is a board comprised of a carrier member, an organization member, and a neutral member either selected by the parties jointly or assigned by the National Mediation Board.

It functions under the auspices of the National Mediation Board. However, it actually is considered an arm of the Board itself.

Q. What is the number of this Board on the Shore Line as to [34] the Firemen?

A. I can't recall the number of that specific Board.

Q. What was the particular dispute submitted by the Firemen to that Board to which you referred in your prior testimony, Mr. McPhail?

A. The dispute centered around the establishment by the carrier of a work train at DeRoad Yard in Detroit.

Q. Were there any other matters besides this specific matter in dispute with the Firemen over the terminal at the DeRoad Yard?

A. Yes. There were several items that were discussed, several claims that were submitted which eventually could not be resolved on the property, and they were also submitted to this Special Board of Adjustment.

Q. Now, do you recall the date of the particular bulletin which established this work train to which you referred at DeRoad?

A. It was sometime in 1963; I am not sure of the specific date, Mr. Curphey.

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Q. Had there been any prior bulletins to this one which established local trains?

A. Yes. We had established trains there around in 1962. However, historically it had gone back for many years before [35] that, but the source of the dispute arose when we established trains there in 1962. But the particular claim itself that was to be handled by the Board was centered around the 1963 period. It might have been September, if I recall correctly.

Q. Now, I hand you what has been marked Plaintiff's Exhibit 5, Mr. McPhail, and I will ask you if you will please identify that exhibit. And in that connection you don't have to read the exhibit in its entirety. Just tell us briefly what it is and its substance.

A. Well, I have already characterized the dispute, and this was the award that was given and it was from Special Board of Adjustment No. 375 in considering Case No. 21.

The award is numbered No. 21, and it sets out the findings, wherein the neutral member of the Board indicated that this particular dispute wasn't a change in the recognized terminal, but simply amounted to an outlying assignment.

Mr. LYMAN: I object to his responding in this way. He is not answering a question, your Honor, but going far beyond it. In addition, the exhibit is here and speaks for itself.

The COURT: Objection sustained.

Q. (By Mr. Curphey—Continuing) Will you state whether or not, Mr. McPhail, Plaintiff's Exhibit 5 is the award of the [36] neutral member, or arbitrator, in that dispute with the Firemen?

A. It is.

Q. And you won the case, didn't you?

A. Yes, sir, fortunately.

Q. And what was the date of this Award No. 21?

A. November 30, 1965,

Q. I hand you—well, you are correct. Now, I hand you what has been marked Plaintiff's Exhibit 6 for purposes of identification. What is this exhibit?

A. This is the proposed memorandum of agreement that was handed to Mr. Vane, the Labor Relations Officer, by

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Mr. Upham, which has already been a source of testimony here, and which was handed to him on December 16, 1965, at that conference that was referred to also.

Q. Is this dated?

A. I don't believe it is.

Q. To your knowledge, Mr. McPhail, is there any letter of transmittal that accompanied this proposal?

A. No, there was not.

Q. Will you state whether or not, Mr. McPhail, in connection with Plaintiff's Exhibit 6 any representative of the Trainmen stated to you that this was a part of the joint Section 6 notice of April 28, 1961, and proposed memorandum [37] of agreement submitted on June 8, 1961, and Mediation Case No. 6755?

A. No, sir.

Q. How was this treated by you when received? What did you do, Mr. McPhail?

A. Well, it was treated as a new matter, as a new dispute.

Q. And what happened then?

A. There was a conference on it, to my understanding, with Mr. Vane which was not productive, and subsequently there was a letter of declamation written to Mr. Upham.

Q. Did you write that letter?

A. No.

Q. Did you see it?

A. Yes, sir

Q. I will now ask you if you will identify what has been marked Plaintiff's Exhibit 7, please.

A. Exhibit is the letter dated January 6, 1966, addressed to Mr. Upham as general chairman of the Brotherhood of Railroad Trainmen over my signature.

Q. And what, briefly, is the subject matter of the letter?

Mr. LYMAN: I object, your Honor. It speaks for itself.

The COURT: Sustained.

Q. (By Mr. Curphey—Continuing) What is the current status [38] of the matter, Mr. McPhail?

A. This particular dispute has been docketed with the First Division of the NRAB.

Q. I will hand you what has been marked Plaintiff's Exhibit 8 for identification.

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A. This is the submission to the National Railroad Adjustment Board, First Division, the carrier's ex parte submission, submitting the dispute.

Q. What is the date of the submission? I don't think it shows on that copy. Do you remember the date?

A. No, I don't, but it is a recent—within the last few weeks.

Q. Now, following the rejection by you—as submitted—of the proposed memorandum of agreement of December 16, 1965, what next developed with respect to disputes with the Trainmen, Mr. McPhail?

A. To my knowledge there was nothing done after that letter of declamation to the Trainmen until the letter from vice president Burke requesting a conference with respect to Mediation Case No. A-6755.

Q. And that, of course, involved the establishment of a Trenton terminal or related matter with reference to those two work trains?

[39] A. Yes, sir.

Q. Now, was there any dispute with the Trainmen, or related dispute earlier this year—in January or February—as to the taxicab service?

A. Yes. We had then and we currently have a dispute with the Trainmen concerning the taxicab arrangement between DeRoad and Trenton.

Q. Did you receive any strike threat in writing from the Trainmen at about that time?

A. Yes, we did.

Q. Now, I hand you what has been marked Plaintiff's Exhibit 9. Will you please identify that?

A. Exhibit 9 is a letter dated February 13th, addressed to myself from Mr. Upham as general chairman of the trainmen setting forth the four items that he states they are going to use as a basis for withdrawal from service.

Q. And was one of the items stated with reference to the December 16, 1965, memorandum?

A. Yes, sir; that was Item No. 4.

Q. And then what subsequently happened with reference to this dispute?

A. The Trainmen referred that particular dispute to the National Mediation Board, indicating that they were going

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to [40] withdraw from service, and the Mediation Board then contacted our line and requested it to make a statement, and of course we did.

Q. In this connection, Mr. McPhail, was there any reference by the Trainmen to the 1961 Section 6 notice in Mediation Case No. 6755?

A. No, sir, there was not.

Q. I hand you what has been marked Plaintiff's Exhibit 10. Will you please identify that?

A. Exhibit 10 is a copy of a telegram addressed to me from the Executive Secretary of the National Mediation Board, informing us that the Trainmen had—that we did not reach agreement with the Trainmen on various notices—of January 6th and December 16th—and asked that we furnish a statement in that connection.

Q. I hand you what has been marked Plaintiff's Exhibit 11, Mr. McPhail, and ask you to identify that particular document, please.

A. This is another wire from the National Mediation Board, received on February 15th, wherein the Board is informing the Shore Line that the notices of—the Trainmen's notice of January 6th and the Trainmen's notice of the 16th was assigned as Case No. 7711, and that they were assigning a mediator.

[41] Q. Was the December 16, 1965, memorandum made a part of this dispute?

A. No, sir, it was not.

Q. Was there any Section 6 notice in connection with that December 16, 1965, memorandum?

A. No, sir.

Q. Has there been any reference, Mr. McPhail, to that December 16, 1965, memorandum in the subsequent correspondence with the Trainmen or with the Board?

A. Yes. The Board indicated that the Trainmen were threatening withdrawal from service not only on the three points contained in their original notice but also including the fourth point, which was the proposed memorandum of agreement.

Q. You are referring, I take it, to the telegram which has been identified as Plaintiff's Exhibit 10?

A. Yes, sir.

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Q. Now, subsequent to that, Mr. McPhail, was there any correspondence or written communications?

A. Not to my knowledge. Are you speaking with specific reference to the Section 6 notice?

Q. No. I am referring to the December 16, 1965, memorandum.

A. No, sir.

[42] Q. Now, Mr. McPhail, did you subsequently advise the Trainmen as well as the Firemen of any anticipated establishment of a terminal at Trenton?

A. Yes, we did. Sometime during the summer we had a request from the Monsanto Company to take over the switching operations in their plant because of a situation on the—within their plant initiated by the New York Central people, and we were requested to make preparations for servicing their plant.

We did post a bulletin, however, before establishing the assignments at Trenton. However, before that time—or between that time and the actual time that we were to enter the plant property to perform switching operations they settled their differences with the New York Central, or at least the New York Central got their differences settled with their organizations, and it was therefore not necessary for us to switch at the plant for Monsanto. Monsanto so advised us and we so advised the operating organizations on the Shore Line.

Q. Now, approximately when did that occur, Mr. McPhail, the approximate date?

A. I think it was sometime in June.

Q. Of this year?

A. Of 1966.

[43] Q. Now, I hand you what has been marked Plaintiff's Exhibit 12. Will you please identify that?

A. Exhibit 12 is a letter dated May 31st, over my signature, and it is addressed to vice president Burke of the Trainmen confirming a conference held on May 26th, and it cites various issues and disputes that were discussed and either the action taken or the agreements reached, or just setting forth the status as a result of the conferences.

Q. Earlier this year, Mr. McPhail, did you have occasion to meet with representatives of the defendant organizations

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with reference to the establishment of a facility at Trenton, Michigan?

A. I did not personally. However, we did set up a meeting with the organizations about the Trenton situation, about the facilities that we contemplated building there.

Q. Did you have occasion to communicate with the general chairmen of the organizations in that respect?

A. Yes, we did. We informed them of a time and date on which we desired them to inspect the location and to consider the facilities that would be necessary as a minimum to provide for their accommodations.

Q. Did such a meeting take place, if you know?

A. Yes, it did.

[44] Q. Now, Mr. McPhail, did you have occasion subsequently to again communicate with the general chairmen of the various organizations?

A. Yes. I believe that subsequent to that meeting the engineering department had prints made and we sent the prints to the various organizations and asked them whether or not they had any comments, suggestions or alterations to make, and we did not receive a reply.

Q. Did you go ahead with the construction of these facilities, Mr. McPhail?

A. Yes, we did.

Q. What is the present situation in that respect?

A. Well, the present situation is that the building has been erected. I am not sure whether we have all of the inside facilities available, but they should be within the next day or so; that is my understanding, that they are just about completed.

Q. Now, Mr. McPhail, I hand you what has been marked Plaintiff's Exhibit 13 for identification. Will you tell us what that is?

A. Exhibit 13 is a letter dated August 10th from vice president Burke of the Trainmen. It is addressed to me, indicating that he has been assigned to assist Mr. Upham. [45] Then he refers to the organization's Section 6 notice, National Mediation Board Case No. A-6755.

Q. And I will now ask you to identify Plaintiff's Exhibit 14 for identification.

A. Exhibit 14 is a letter dated August 12th, over my sig-

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nature, acknowledging to Mr. Burke his letter of August 10th with respect to Case No. A-6755, indicating that we would be agreeable to discussing it.

Q. Would you please identify Plaintiff's Exhibit 15?

A. Exhibit 15 is a copy of a bulletin dated September 19, 1966, over the signature of the Terminal Trainmaster, which in effect provides for the establishment of two assignments, at Edison Yard, at Trenton—excuse me, one assignment.

Q. Now, subsequent to Award No. 21 in your favor on November 30, 1965, did a subsequent dispute arise with the Firemen as to that subject matter?

A. Would you please restate the question.

Q. I will withdraw it and rephrase it. Subsequent to Award No. 21 in your favor on November 30, 1965, Mr. McPhail, did a dispute arise with that general—on that general subject matter with the Firemen?

A. Yes. There was a dispute which arose as an outcome of the award.

[46] Q. Will you state whether or not you subsequently received a Section 6 notice from the Firemen?

A. Yes, we did. We received a Section 6 notice from the Firemen's organization, which in effect requested that all trains operate in and out of Lang Yard in Toledo.

Q. Now, will you please identify for us what has been marked Plaintiff's Exhibit 16?

A. Exhibit 16 is a letter dated January 27th. It is addressed to me from Mr. Rancich, general chairman of the Firemen's organization, which sets out the Section 6 notice, and indicates the request they are making with respect to the assignment of crews at Lang Yard.

Q. And please identify Plaintiff's Exhibit 17.

A. Exhibit 17 is a letter dated June 28th from the executive secretary of the National Mediation Board. It is addressed to myself and to the president of the Firemen's organization, acknowledging the application has been made for mediation and assigning the application as Docket Case No. A-7839, indicating that a mediator would be assigned.

Q. What is the present status of this matter?

A. We are still waiting—or are still awaiting the assignment of a mediator.

Q. Now, Mr. McPhail, will you explain briefly how oper-

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ating [47] conditions have in fact changed with respect to the Trenton area since 1961?

A. Well, of course, in 1961 we were serving the Monsanto Company plant as well as other industries in that area and performing switching in the Edison Yard in Trenton, but with the trains originating and terminating in Lang Yard.

Subsequent to 1961, however,—and I have already indicated that Monsanto desired to have two carriers switch there. So that that actually characterized a change in our operations. So that we did fluctuate from the assignment of local trains, anywhere from three, four or five trains, as the traffic requirements and switching requirements permitted.

At the present time, of course, beginning this October, we have the requirement for switching in Monsanto on an annual basis; and, considering that we had two assignments at Lang and two at DeRoad, we assigned an additional new assignment at DeRoad to handle the Monsanto arrangement, the Monsanto Company plant arrangement.

Q. Let me interrupt you there, Mr. McPhail. In your last sentence you said that you established a new assignment at DeRoad.

Isn't it correct that you established a new assignment [48] in Trenton last month rather than at DeRoad?

A. Well, we did establish the new assignment at Trenton and it worked for one day. Then we, of course, reached the status quo and we took the bulletin down.

Of course, the change that we have in the future is going to be reflected by the request of the McLouth Steel Corporation to build a track into their North Trenton plant, which will involve the assignment of additional crews for that particular place.

In other words, what I am trying to say is that the situation at Trenton has changed since 1961. It continues to change, and that area is going to be the area of greatest growth on our line. It is characterized as the "Down-river Area," where industry is building, and there is tremendous activity in that area.

Mr. LYMAN: Your Honor, I move that that last statement of the witness be stricken as not responsive.

Mr. CURPHEY: I think it is responsive, your Honor.

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The COURT: The objection will be overruled.

Q. (By Mr. Curphey—Continuing) Mr. McPhail, will [49] you please state briefly what injury, if any, the Shore Line Railroad Company will sustain if the threatened strike is carried out?

Mr. LYMAN: If I might address the Court for just a moment.

I feel that although we have denied the allegations of irreparable injury and monumental expense, and so forth, for the purpose of this case, to avoid dragging it out, we stipulate that there would be sufficient irreparable injury from the strike to support the equity requirements.

Mr. CURPHEY: That statement is sufficient for me, your Honor.

The COURT: Very well. Then you may proceed.

Q. (By Mr. Curphey—Continuing) Will you please state briefly, Mr. McPhail, how the public interest would be affected, if at all, by the carrying out of the threatened strike?

A. Well, certainly in the public interest we have the industries on our line that we serve exclusively that would be affected. And, of course, we are a part and party and as a matter of fact a supply line for the automobile industry, [50] particularly General Motors, and certainly once we start manipulating that supply line the automobile industry is in serious trouble.

Mr. CURPHEY: You may inquire, Mr. Lyman.

* * * * *

CROSS EXAMINATION.

By Mr. R. R. LYMAN:

Q. Mr. McPhail, at the time you received the December 16, 1965, proposal—or Mr. Vane received it—was there any action that was pending on the part of the railroad to reinstate or to open a new terminal at Trenton or to establish Trenton as a terminal?

A. The notice was December 16, 1965, you say?

Q. Yes.

A. At that time there was no intention of so doing; at

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least there was not any open effort on our part. We had been desirous of establishing facilities at Trenton. I presume that you are differentiating between our initiating something, a bulletin?

[51] Q. Yes.

A. There was no bulletin on our part, or actual effort to push our way into Trenton.

Q. You have not sent out any communications with such intention?

A. No; we have not since 1963.

Q. In other words, between the time the Mediation Board notified the parties of the failure of its efforts and finally terminated mediation and closed its files on Case No. A-6755 to and beyond December 16, 1965, there had been no further move on your part in the direction of Trenton as the terminal?

A. I don't believe so. I am only trying to get the dates clear in my mind.

Q. Well, the closing of the files on the part of the Mediation Board was April 3, 1963, I believe.

A. Do you mind if I refer to some dates?

Q. No. You may check them.

A. No, not to my knowledge, because after 1963 we went to DeRoad, and we operated with a train and engine crew, and then we went to the taxicab arrangement. So I am fairly sure there wasn't anything initiated by us.

Q. Now, Mr. McPhail, I believe you testified that you [52] declined arbitration at the termination of Case No. A-6755, and in so doing advised the Board and the other parties that you felt that the matter was moot, and that you no longer intended to go to Trenton, is that correct?

A. Yes, sir.

Q. Now, this December 16th proposal was handed to Mr. Vane in connection with the discussion of an unrelated dispute, I believe you said in your Complaint, which would be the taxicab problem, is that correct?

A. Yes. Yes. I think there were other proposals, including the taxicab arrangement. I think there was an actual docket of issues to be discussed.

Q. Could we describe the taxicab matter as the one being currently involved in A-7711?

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A. Yes, sir.

Q. And these other extraneous matters referred to were not involved in A-7711?*

A. May I refer to the exhibit that has to do with the National Mediation Board taking jurisdiction?

Q. If your counsel can locate it for you.

A. (Witness refers to various documents.) I would like to, if I may,—would you ask your question again?

(THEREUPON, the last question* was read [53] to the witness by the Reporter.)

A. No, sir, only the three items from the January 6th proposal was made a part of 7711.

Q. Now, did you understand that the purpose of that proposal on the taxicab arrangement was to negotiate for an agreement which would prohibit you from using DeRoad as a terminal, Mr. McPhail?

A. No, sir, not from the wording of their Section 6 notice.

Q. Did you get that impression from subsequent negotiations on it that they were trying to prevent the use of DeRoad as a terminal?

A. No. I was always under the impression that they simply wanted to be—wanted to attach a condition because of our transporting crews by this arrangement, and under the Section 6 notice it asked for allowances for liability protection, insurance.

Q. In other words, a means to protect and benefit the employees who were being required to travel from DeRoad to Trenton by taxicab at the beginning of their day's work?

A. Yes, sir.

Q. Now, referring back to Case No. 6755, Mr. McPhail, which was initiated by the April, 1961, Section 6 notice, did you understand that that notice was to have as its purpose the prohibiting of Trenton as a terminal point?

[54] A. Not prohibiting it out of Trenton but attaching certain conditions in the event we desired to go to Trenton.

Q. In attaching protective conditions for people who are involved in that transportation by cab from DeRoad to Trenton in the Section 6 case of 1961 the purpose was not to oppose it but to challenge your right to put it there by obtaining an agreement from you affording certain protec-

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tion and mileage allowances, and so forth, for employees?

A. Well, I don't agree with your statement simply because I am sure that it was the intention on the part of the organizations when they originally served their Section 6 notice that they were in a position to challenge our right to go there, and subsequently, however, our right was sustained, and——

Q. (Interposing) But I was directing my question to your understanding of the purpose of the Section 6 notice. It was not to preclude your use of Trenton as a terminal point, was it, sir?

A. I would say that the intent was to make it so expensive for us by attaching certain conditions that it would be impossible for us to go to Trenton.

Q. Well, is it true that in an initial bargaining session you ask for more than you expect to get and negotiate the [55] differences back and forth?

A. Yes, true; when you receive the original notice, either one side gives a lot or the other side does.

Q. Did you give a counterproposal to their April, 1961, Section 6 notice?

A. Yes.

Q. What was that proposal?

A. A counterproposal.

Q. I mean what was the substance of it? Was it in a formal document?

A. Oh, yes. We have copies of it in our files. If you care, we could produce them.

Q. Do you remember the substance of it?

A. I remember——

Mr. CURPHEY: (Interposing) If your Honor please. I object to this on the ground that it is irrelevant to the legal issues involved here. I think we are going to get far afield if we get into the terms of the bargaining. I think it is incompetent, irrelevant and immaterial and will cloud the legal issues.

Mr. LYMAN: I am not trying to get into the bargaining matter, but asking him about the subject matter of the Section 6 notice and the counterproposal [56] made in 1961.

The COURT: I am inclined to think that since one of

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the issues is that this is a different matter than the 1961 notice, it would seem to me that what they were actually bargaining about at that time is relevant so that we can determine whether this is different or part of that.

Mr. LYMAN: That is correct, your Honor.

Q. (By Mr. Lyman—Continuing) Mr. McPhail, would you say that the proposal handed to Mr. Vane on December 16, 1965, had or covered the same general subject matter as the organizations' 1961 proposal and your counterproposal to that?

A. Well, I think they are in the same ball park. However, I think there are restricting—various restrictions placed upon our operation that were not similar. And of course there were some that were similar.

Q. You mean in the specific proposals of the two organizations, that there were some different items between the two proposals?

A. In the first place, in the 1961 notice they were—the organizations were conceding that we could operate within—I don't know, within fifteen miles one way or the other [57] out of Trenton; while the December 16, 1965, proposal restricted it to a mile or a mile and a half, and that in itself is a marked difference.

Q. I appreciate that, Mr. McPhail, but the general subject matter was the same, was it not: To attach conditions and protection, perhaps, to your use of Trenton as a terminal point and not to prohibit the use of Trenton as a terminal point?

A. Yes.

Q. Now, suppose that you had reached agreement in Case No. 6755 instead of breaking off and declining a proffer of arbitration—suppose you had reached agreement—would the taxicab case have arisen?

A. I don't think so.

Q. So that if in the course of the handling of negotiations in the taxicab case you decided to take another look at going back to Trenton, that could have settled both disputes, couldn't it?

A. If we had negotiated an agreement.

Q. So that if you had negotiated an agreement to go back

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to Trenton there wouldn't have been a taxicab operation, would there?

A. No, if we had negotiated an agreement several years ago, [58] before we got into the taxicab arrangement.

Q. Or even—well, let's assume in a wild flight of fancy, Mr. McPhail, that you had accepted Mr. Upham's offer of December 16, 1965, that would have ended the taxicab case, would it not?

A. May I refer to Mr. Upham's Section 6 notice?

Q. Yes. I am not asking you to agree with it; it is a hypothetical question. Which exhibit are you examining now, Mr. McPhail?

A. Exhibit No. 9. Actually, the Section 6 notice in itself does not confine itself to Trenton. Number One, however,—

Q. (Interposing) Which Section 6 notice are you talking about now?

A. The January 6, 1965, notice of the Trainmen.

Q. That is the one relating to the taxicab situation, isn't it?

A. Yes, sir.

Q. That notice did not involve Trenton at all, did it?

A. It didn't say that it did.

Q. Well, getting back to what I am driving at, Mr. McPhail, if you had agreed upon the use of Trenton as the terminal point, which was provided for in Mr. Upham's December 16th proposal, then you wouldn't have been running men from DeRoad to Trenton by taxicab, would you? [59] A. No, sir.

Q. Now, if you had agreed upon Mr. Upham's December 16, 1965, proposal, would you feel that that would have settled all of the issues involved in Mediation Board Case No. 6755 and that you had negotiated to a standstill?

A. Mr. Lyman, as far as I am concerned I think we are getting into a hypothetical situation and I don't feel I am qualified to state one way or the other, for myself or for the carrier.

Q. I am not trying to be unfair, Mr. McPhail, and I appreciate your arguing to this Court that 6755 was a dead issue and that anything that came along that was new would in your judgment be a new dispute, and you have so testified.

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But if you will assume hypothetically with me that you were mistaken in that No. 6755 were still alive, would not the Upham proposal of December 16, 1965, have settled all the issues in 6755?

A. I am not sure that it would.

Q. Why do you say that? What would have remained in dispute under the Section 6 notice of 1961 that would not have been settled by Upham's December 16th proposal?

A. Well, that places me in a difficult position when you are talking about a hypothetical question, because I would have [60] to know the agreement was consummated and whether or not it embodied everything embodied in the December 16th Section 6 notice.

Q. Didn't you go through negotiations on these matters? You are familiar with that, aren't you?

A. In 1961, yes.

Q. You had a series of negotiations on it, didn't you?

A. Yes, sir.

Q. Yes, extending over a two-year period, I guess, before you exhausted the procedures of the Railway Labor Act; isn't that correct?

A. Yes, sir.

Q. And if you had reached agreement on Upham's December 16th proposal—or one like it, let us say—in April, 1963, wouldn't you have considered that was a wind-up of your Case No. 6755?

A. I would say that if we had reached agreement that certainly 6755 would have been closed upon the consummation of an agreement.

Q. Well, it covered the same subject matter, the December 16th proposal, as 6755?

A. No, it did not.

Q. Oh.

[61] A. I should like to remind you that Section 6—

Q. (Interposing) Go ahead.

A. (Continuing)—that the Section 6 notice of 1961 embodied requested that were desired by three organizations, whereby the Trainmen's notice of December 16, 1965, pertained only to requests from the Trainmen.

Q. That is a very valid conclusion, Mr. McPhail, and perhaps I should have framed my question in terms of whether

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or not that would have been a settlement of the issues between the carrier and the Trainmen.

A. It could be; depending, of course, upon the type of agreement that was consummated, there might still be outstanding disputes.

Q. Is it your understanding that the April, 1961, Section 6 notice was limited in its purpose and scope to the proposed operation of the terminal at Trenton and did not encompass other points on the railroad?

A. What was the date of the notice?

Q. The Section 6 notice of April, 1961. I don't have the exact date of it, but it is the notice that culminated in Case No. A-6755.

A. Right. Now, what was your question?

Q. Was it your understanding that the subject matter of [62] that notice ending in A-6755 was limited to the establishment of a terminal at Trenton, or did it encompass other points on the railroad?

A. No, it was confined to Trenton.

Q. Even though it was not so worded, you arrived at this understanding?

A. It referred to Trenton specifically.

Q. I see. And the December 16th proposal of Mr. Upham was limited to Trenton, was it not?

A. Yes, because it provided for a certain area in Trenton, Mr. Lyman.

Q. Had you had any discussions at all with any of the organization people, or any of the members of these defendant organizations, prior to the December 16th proposal on any proposals about going back to an attempt to open a terminal point at Trenton?

A. How far back are you going?

Q. Between the time that the Mediation Board concluded its efforts and you said the matter was mooted until December 16th, 1965.

A. As far as I can recall, there were not any actual conferences docketed. However, there were occasions to have some passing remarks between the general chairman or between [63] myself and the vice president representing the Trainmen at that time as to what might be done at Trenton.

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However, it was simply passing remarks, certainly nothing I negotiated or any proposals mentioned or discussed.

Q. Now, Mr. McPhail, when the Mediation Board closed its files in 6755 did you then feel that that matter had been handled to a conclusion under the Railway Labor Act and that the employees would be free to strike if they had anything to strike over?

A. Did you say "65"?

Q. I think I said "6755." When the Board closed its files in 6755 did you then feel that both parties were under the Act free to use their economic strength if you had gone ahead with your plans?

A. At that time. In fact, I always did feel that we had the right to go to Trenton.

Q. There was no question in your mind that everything that was done that was prescribed by the Act had been completed and either party was free to take any steps it wanted to take?

A. At that time, yes.

Q. Was that why you decided to abandon your plan to go to Trenton, because if you did the organizations might strike?

A. No, sir. We also, of course, have to consider our customer, [64] and obviously if we get into any labor situation it reflects on our relationship with the customer, and rather than upset that relationship we decided to place our crews at Trenton until such time until we could determine some other course of action.

Q. You don't mean Trenton but DeRoad, do you not?

A. DeRoad. I'm sorry.

Q. So in the light of those considerations you told the Mediation Board and the other parties that that whole matter of the move to Trenton was moot?

A. Yes, sir.

Q. And it was not until after you again renewed your interest in Trenton this year that there was any effort made by the organizations to strike over that situation; is that not correct, Mr. McPhail?

A. It not only involved the Trenton arrangement, insofar as Monsanto is concerned, but we have this arrangement

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with McLouth Steel Company next month and we will be switching that plant which will perhaps take two crews to operate in that area, which is additional business.

Q. Now, Mr. McPhail, going back again to 1961 and this Section 6 notice that was served on your company—I believe it was in April of 1961—which resulted in Case No. 6755, [65] that notice had been preceded by a bulletin posted by the carrier, had it not, announcing a proposed establishment of trains to operate out of Trenton?

A. Not the establishment of trains, the transfer of trains.

Q. The transfer of trains then.

A. Yes, and that proposal was also included in a letter.

Q. So that it was the threat to move to Trenton which precipitated the 1961 Section 6 notice?

A. Yes, sir.

Q. Would you say that there is any difference in substance, other than the train numbers, between the 1961 Section 6 notice and your bulletin of September 19, 1966, which precipitated our presence here in court today?

A. Well, I certainly would like to see or have an opportunity to observe the two bulletins to make a comparison.

Q. You don't have copies of them with you?

A. I haven't, no, sir.

MR. LYMAN: I haven't had these marked yet, your Honor. I will show this to the witness to see if it refreshes his recollection.

Q. (By Mr. Lyman—Continuing) Directing your attention to this letter of February 21, 1961, Mr. McPhail, does that refresh your recollection as to the proposal you made prior [66] to the 1961 Section 6 notice?

A. Yes. At that time we had four assignments operating out of Lang, and this was a letter to the general chairman indicating that because of our drastic drop in revenue that we desired to transfer 406 and 407 from Lang to Edison.

Q. Now, going back to my original question, Mr. McPhail, would it be fair to say that that notice is the same in character as the September 19, 1966, bulletin which precipitated this action?

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A. Well, Mr. Lyman, I certainly don't want to be argumentative, but if you look at it in a different light the letter you have there is advice to the organizations, whereas the bulletin dated September 19th is a bulletin that we are required by the rules to issue.

Q. I didn't mean to raise any question about that, but they deal with the same kind of proposal, don't they?

A. Which is true, which is the only way we can get crews up there. The only way we can get crews up there is to establish it by bulletin.

Q. You sent a letter, filed or posted a bulletin, and that was followed by a Section 6 notice by the three organizations seeking an agreement which would attach protective clauses to that move, is that correct?

[67] A. I can't agree that they are the same, because in 1961 we wanted to transfer two trains, and on September 19th we are talking about a new assignment.

Q. But both involved the establishment of Trenton as a terminal point?

A. Yes, sir.

Q. Has Trenton ever been a terminal point?

A. No, sir, neither has Monroe either or any other point except DeRoad.

Q. We are not concerned with Monroe or any other point, Mr. McPhail, but with Trenton, isn't that true?

A. Yes, but I am only pointing out that that is a difference.

Q. So that it was the proposal to establish Trenton as the terminal point and the purpose of using it to tie trains up that precipitated the Section 6 notice of 1961?

A. Yes, sir.

Q. And that was subsequently handled through the Board, and then you said the whole thing was moot—or through the Act—and when you said the whole thing was moot after you got through all the procedures of the Act.

So you didn't exercise your right under the statute to go ahead and do whatever you pleased after handling it under the Act, and you made no further move until this year to go [68] back to this proposal, is that right?

A. We had no reason after that; we were no longer

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switching for Monsanto. Of course it was moot; we had no need for the assignments.

Q. Haven't you switched at Monsanto at any time from 1963 until this month?

A. Yes, sir, we switched. We went in in 1964 and 1965.

Q. Now, you made no move in 1964 or 1965 to go back to Trenton, did you?

A. No, sir, because we did not have the same reason that we have now.

Q. What is the difference between switching Monsanto in 1964 and 1965 and switching it in 1966 and 1967?

A. There is no difference there, but we have an additional motive for going to Trenton.

Q. And what is that?

A. The entry into the McLouth Steel plant.

Q. In other words, you would be establishing more trains if you go to Trenton in 1966 than you would have established if you had gone there in 1961, is that right?

A. Yes, that is true. It is not feasible to operate all of those trains out of Lang.

Q. So it is a difference in quantity rather than kind, is [69] it not?

A. I would say that is correct.

Q. What are the nature of the savings that you would effect by moving to Lang—Trenton?

A. Well, from DeRoad or from Lang?

Q. Well, let's say—take each one in turn. What would you save by serving Trenton instead of DeRoad?

A. I think out of DeRoad—we are operating out of DeRoad now, and the last year we served Monsanto—are you looking for a monetary figure?

Q. No, I am not. I am asking for the nature of the savings. In other words, in what area would they lie?

A. The area would be the elimination of the extremely heavy expense of transporting crews from DeRoad—or between DeRoad and Trenton.

Q. At the present time DeRoad is the point where those employees report to work, and from the time that they report until they get in the cab to go to Trenton, check in to work, come back and check out, they are on the payroll, is that right?

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Are they being paid wages while riding the taxicab from DeRoad to Trenton?

A. Yes.

[70] Q. So that if you could make the employees report at Trenton instead of DeRoad you would save the wages you would have to pay them for that travel?

A. Yes. I don't think there is really any question that we are trying to get a more efficient operation.

Q. So that the only saving we are talking about in this case is of a monetary nature?

A. Of a monetary nature. After all, what else could it be?

Q. There is nothing different in the way the Monsanto Company plant would be serviced; it is just getting the men there to get on the trains and operating them?

A. The employees would not have to drive to DeRoad. They could drive to Trenton rather than drive through the congested areas of Lincoln Park and River Rouge up there. Certainly they have some equity in this situation also.

Q. Well, what do you save by making them report at DeRoad instead of the Lang Yard, for instance?

A. We save the time it takes them to go from—the greater distance from Lang in Toledo to Trenton. It is more difficult because of the heavier switching operations that we have at Lang to get them out of the yard with a train.

And of course it is a run of about 34 or 35 miles up there, in contrast to DeRoad, which is only 10 miles, and that [71] works in reverse upon proceeding to the tie-up point.

Q. So that the carrier saves money by using DeRoad instead of Lang to service the Monsanto Company plant, but that saving is accomplished at the expense of the employees, isn't it?

Mr. CURPHEY: I object to that question as argumentative, your Honor.

The COURT: Objection overruled. This is cross examination. I am very liberal on the point.

Q. (By Mr. Lyman—Continuing) In other words, the carrier has a shorter cab run from DeRoad to Trenton than from Lang to Trenton, but the employees whose homes are centered around, presumably, an area of which Lang would

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be the central location, he would have to transport himself from Toledo to DeRoad to go to work?

A. By the same token, at Trenton—or to Trenton it would be shorter. So we are also giving him a saving.

Q. I don't mean to get into any bickering, Mr. McPhail, but I am simply trying to get the mechanics of what we are talking about here.

You did service Monsanto for many years by using Lang as the terminal point, did you not?

[72] A. Yes.

Q. For how many years was that?

A. I don't feel I am qualified to answer that.

Q. Well, —

A. (Interposing) Many years.

Q. Maybe I was insulting you by implying that you were that old, Mr. McPhail.

A. No, not really.

Q. Now, Mr. McPhail, I understood your testimony to be that you have submitted to the National Railroad Adjustment Board a dispute arising out of—or the dispute involved in the December 16th proposal that Mr. Upham gave you. Did you intend to so testify?

A. Well, I think it is a matter of record that we have already submitted that dispute to the First Division.

Q. Well now, you told me a little while ago that Mr. Upham's proposal didn't involve any question of your right to establish Trenton as the terminal point. It was for the purpose of obtaining protective conditions for employees if you did establish it, is that correct?

A. Yes, sir.

Q. That is not included in your submission to the Adjustment Board, is it?

[73] A. His memorandum of agreement?

Q. No, the dispute over whether or not you would give protective conditions to employees when you establish a terminal at Trenton. Was that submitted to the Adjustment Board?

A. May I refer to the submission itself?

Q. I don't know where it is at the moment. Perhaps your counsel can help you.

A. (Referring to documents.) The issue in dispute, as

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set forth in our ex parte submission, was asking for the First Division to decide whether or not there were any restrictive clauses in the contract that would prohibit the carrier from establishing a road crew at Edison.

Q. Had the Trainmen ever claimed that there were such causes that would prohibit you from establishing a terminal point at Trenton?

A. Yes, they have. Sometime ago they said we didn't have the right, but since the decision we have received in our favor I would say that they for all practical purposes have at this time conceded that we have the right to go there, but they desire to attach the conditions to it.

Q. So that you don't have any current dispute, with the Trainmen at least, as to your right under their current [74] agreement to set up the terminal at Trenton?

A. Well, when you look at it from a practical standpoint, even though they concede the right of the railroad to go there, they attach conditions such as to make it prohibitive. So in effect we don't have the right.

Q. Will you answer my question, Mr. McPhail? My question is whether you have any current dispute with the Trainmen over your right to set up a terminal at Trenton.

A. There is not a formal dispute, no.

Q. Well, have you handled any such dispute or any claims to that effect on your property with the Trainmen?

A. We have not had any cause to handle claims.

Q. Because you didn't make any change?

A. Because we didn't make any change.

Q. Since you notified these organizations for the first time this year of your intention to set up a terminal at Trenton, as illustrated by the bulletin notice which you issued in June, then recalled it, and then your subsequent September 19th notice of last month, Mr. McPhail, were any claims from the Trainmen precipitated by those notices or have any been filed since those notices to the effect that your current agreement won't let you do this?

A. I don't believe we have any claims because we have [75] not—I can't answer that without qualifying this statement, because we did work the job one day at Trenton, and whether or not there are any claims that would have progressed or followed would have been without my knowl-

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edge, because they would have progressed at the superintendent's level and I would not have knowledge of it.

Q. But we didn't have any claims before you filed a submission with the Adjustment Board, isn't that correct?

A. No claims.

Q. And your Adjustment Board submission, regardless of the way you describe it in your Complaint, is couched in terms simply of asking for an interpretation of your current agreement, is it not?

A. Yes.

Q. And it does not ask the Adjustment Board to settle this dispute of whether or what kind of agreement should be reached covering protection at Trenton, Mr. McPhail, so how do you figure that this Adjustment Board could handle and dispose of this dispute on that kind of submission?

Mr. CURPHEY: I object to that question, your Honor. In the first place, it is argumentative, and it is a legal argument on the part of counsel. The argument should be made to the Court at the conclusion [76] of the evidence.

Mr. LYMAN: We will do that, too.

Mr. CURPHEY: I know, but you are arguing to the Court through the witness now.

Mr. LYMAN: I think it is proper to inquire into his motives.

The COURT: The objection will be overruled.

The WITNESS: Will you please restate the question?

The COURT: Repeat the question, read the question, Mr. Archambault?

(THEREUPON, the question was read by the Reporter, as follows: "Q. And it does not ask the Adjustment Board to settle this dispute of whether or what kind of agreement should be reached covering protection at Trenton, Mr. McPhail, so how do you figure that this Adjustment Board could handle and dispose of this dispute on that kind of submission?")

A. Frankly, I don't know what kind of a decision we are [77] going to get from the Adjustment Board, Mr. Lyman. Of course, it is our position that we already have clauses in our contract to provide for going to Trenton and

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establishing Trenton as a terminal. I don't know what kind of a decision we are going to get.

Q. How do you think that an award holding that you do have a right under your agreement to go to Trenton would resolve the dispute between your organization and the Trainmen as to whether or not you will agree on protective conditions for people at Trenton?

A. I don't think the First Division is going to tell us what conditions should be imposed.

Q. You say you do not think so?

A. I don't think they will, no.

Q. That is not what the file says, is it?

A. That is right, but they can rule on any dispute that may exist.

Q. Do you mean a dispute over contract negotiations or interpretation?

A. Contract interpretations.

Q. But nothing to do with making a new contract?

A. No.

Q. So that when you said that the December 16th proposal of [78] the Trainmen for a new contract was submitted to the Board as currently pending and that is its present status, that is not very accurate, is it?

A. Yes, I think it is accurate, because here we have a simple subject of dispute and I think it is properly referable to the First Division.

Q. When did you refer this submission to the First Division? When was it filed?

A. I don't have the letter of transmittal on this.

Q. Isn't it a fact that it was filed just a day or two before this lawsuit was filed?

A. Yes, I would say so.

Q. Had there been any discussions with the Trainmen on your property prior to the filing of this submission to the Board of the dispute represented by the submission?

A. With the Firemen?

Q. The Trainmen. You filed this against the Trainmen, as I understand it.

A. Yes.

Q. Had you discussed it with them at all on the property before you filed with the Board?

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A. Discuss what?

Q. The question of whether or not your agreement gave [79] you the right to go to Trenton, which is what you asked the Board to decide for you.

A. Which is true, but I don't believe there was any discussion as to the right; I don't think that ever really got into it. They were endeavoring to enforce certain conditions.

Q. By negotiating a new agreement?

A. Right.

Q. Not by a claimed interpretation of your agreement?

A. Not as it pertained to the particular claim.

Q. When did it first occur to you to file your submission to the Board?

A. When it appeared very much as though we were going to get into a legal situation.

Q. Well, it is a fact, isn't it, that your counsel advised you that it would be a good idea to have something pending before the Adjustment Board so that you could say that this is a minor dispute?

A. I don't think there is any question about that, Mr. Lyman.

Mr. CURPHEY: I object to the inference here, your Honor, and state that the witness testified on direct examination that he filed this upon the advice of counsel. There is no question about it. But there is an improper inference in that question.

[80] The COURT: Objection overruled.

Q. (By Mr. Lyman—Continuing) Do you normally file submissions with the Adjustment Board without any handling on the property?

Mr. CURPHEY: I object to this, your Honor, as irrelevant.

The COURT: Overruled.

A. Well, certainly not, Mr. Lyman. We have to go through the procedures of the Railway Labor Act, and until we do—and in particular reference to the disputes—until such time as conferences are terminated on the property, neither we nor they have a course to follow.

Q. Well, isn't it true and is it your understanding that

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with reference to Adjustment Board cases there is a requirement that the matter must be handled to a conclusion on the property in the usual manner?

A. Yes, sir.

Q. And there has been no such handling on this submission, has there?

A. Yes; there was a letter of declamation sent to the Trainmen's organization.

Q. Declining the December 16th proposed agreement, you mean?

A. Yes, sir.

[81] Q. But there has been no handling on your property in the usual manner of a dispute over the meaning of their current agreement, has there, insofar as your right to go to Trenton is concerned?

A. On the question of our right to go there, they are also questioning the interpretation of the rules. In other words, the rights are set forth in the contract.

Q. As to the right under the agreement, there had been no handling of that question on your property?

A. No, sir, not as to the right.

Q. But that is the question that you submitted to the Adjustment Board, is it not?

A. Well, yes, it is, because the dispute centered around the interpretation of the contract.

Q. Now, in discussing Mediation Board Case No. A-6755, Mr. McPhail, you testified that the Firemen's organization, which had been a joint participant in that case with the Trainmen, withdrew their Section 6 notice and withdrew their application for services of the Mediation Board because of their intention to file a submission with a special board objecting to your move to DeRoad; is that accurate?

A. Yes, sir.

Q. But that withdrawal did not occur prior to the Board's [82] completion of its handling of A-6755, did it?

A. May I refer again to the exhibits to get the dates straight?

Q. Yes.

A. Perhaps I can get it from here. I don't have the letter before me showing the date of the withdrawal from the Section 6 notice by the Enginemen (sic). However, I do

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have the date of the award of the Special Board of Adjustment dated November 30, 1965.

But without having the actual date of the letter of withdrawal, I am quite sure that they withdrew on the basis—and it was so stated in a letter—that the settlement of this case would, for all intents and purposes, settle the question of the right of the carrier to establish outlying terminals.

Q. A letter to whom?

A. A letter from the Enginemen to the carrier.

Q. They didn't do that, however, until they had withdrawn from the mediation proceedings, did they?

A. Well, at the same time, and it was embodied in the same letter that made reference to A-6755. They made reference to the fact that there was no agreement that could be reached, but they were going to withdraw as participants in A-6755 on the basis that the settlement before the Special Board of [83] Adjustment would settle the issue.

Q. Wasn't the basis on which they withdrew rather the fact that you had represented to everybody that the matter was moot, and the parties in effect said that in view of your statement they would withdraw their application?

A. No, sir, they didn't state that to me.

Q. You are familiar with this correspondence from the Board to the parties, are you not?

A. Yes, and also the letter we received from the Train—or the Enginemen.

Q. Do you have a copy of that here?

A. Yes, we do.

Mr. LYMAN: Was that included in the exhibits filed this morning?

Mr. CURPHEY: It is not included, but here it is if you want it. (Handing documents to counsel.)

Q. (By Mr. Lyman—Continuing) The letter you are referring to is the letter from the Firemen to yourself?

A. Yes, sir.

Q. Would you look at this, what your counsel has handed me, to see if it refreshes your recollection?

A. This is the letter to which I am referring.

[84] Q. What is the date of it?

A. September 10, 1965.

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Q. 1965?

A. Yes.

Q. And that is a withdrawal of the Firemen's participation in Case No. A-6755, and it so indicates, does it not?

A. It is not a withdrawal. It is a notification to us of an intent to withdraw.

Q. But it does specifically refer to that Mediation Board proceeding by case number, A-6755, does it not?

A. Yes, sir.

Q. And that was—what was the date, again?

A. September 10, 1965.

Q. When did you make the move to DeRoad to start operating out of there on this taxicab arrangement?

A. On the taxicab arrangement?

Q. Well, let us say, start servicing Trenton out of DeRoad. Put it that way.

A. The taxicab arrangement was started in approximately December of 1964 and continued through 1965. It was in the latter part of 1962, to the best of my recollection, that we established an assignment at DeRoad. I think we established two, if I am not mistaken.

[85] Q. Was it the understanding that anyone felt that, that this submission to the Special Board was involved in the Trenton situation?

A. I can't speak for "anyone," Mr. Lyman.

Q. Wasn't the submission in fact strictly limited to the situation at DeRoad?

A. Which submission are you talking about?

Q. Before the Special Board of Adjustment.

A. It had to do with DeRoad, yes, sir, as specifically stated in the claim.

The COURT: Will you have much more cross examination of the witness, Mr. Lyman? We have just about reached noon recess.

Mr. LYMAN: If I continue it would be half or three-quarters of an hour, your Honor, but perhaps I might be able to make it shorter during recess by a weeding-out process.

The COURT: If it is going to take you more than five or ten minutes, then I think we had better take our noon recess at this time.

Court will be in recess until 1:30.

Testimony of Clayton J. McPhail

[86]

AFTERNOON SESSION

Thursday, October 6, 1966

1:30 o'clock P.M.

The COURT: You may resume your cross examination, Mr. Lyman.

Mr. LYMAN: If the Court please, I think the noon recess was beneficial, and considering it over the lunch hour we have no further questions of Mr. McPhail.

The COURT: Mr. Curphey, any redirect on your part?

Mr. CURPHEY: Yes, your Honor, and I will be brief.

The COURT: You may proceed.

* * * * *

REDIRECT EXAMINATION.

By Mr. JOHN CURPHEY:

Q. Upon cross examination, Mr. McPhail, you were shown a letter by opposing counsel to refresh your recollection, and I should like to now hand you what has been marked Plaintiff's Exhibit 18 for purposes of identification.

[87] A. Exhibit 18 is a letter dated September 10th. It is a letter written to me by Mr. D. C. Deering, vice president of the Brotherhood of Locomotive Firemen & Enginemen.

Q. Is that the letter you referred to on cross examination?

A. Yes, sir.

Q. Now, with reference to Plaintiff's Exhibit 8, which is the submission to the Adjustment Board about which you also testified on cross examination, will you state whether or not this submission was made upon advice of counsel?

A. Yes, it was.

Q. And whose advice was that?

A. By you.

Q. Now, in connection with this matter will you state whether or not the matter was handled on the property up to and including the highest designated officer?

A. Yes, it was.

Q. Now, Mr. McPhail, under your existing agreements

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with the Trainmen will you state whether there was anything in those agreements that would have prevented your establishing a terminal at Trenton prior to last month?

Mr. LYMAN: If the Court please, I object to that question. It calls for a conclusion of the witness on the law and his interpretation of the [88] contract. The contract speaks for itself if he wants to put in evidence. I don't think the witness's opinion of the legal effect of the agreement is proper.

The COURT: Objection sustained.

Q. (By Mr. Curphey—Continuing) Is there any rule, Mr. McPhail, in your contract with the Trainmen in connection with establishing facilities at Trenton?

Mr. LYMAN: If the Court please, I object to that question on the ground that the contract is the best evidence for what it contains, and I am sure the document is available to the plaintiff as a contracting party, and we should leave it to the Court to determine what its effect is.

The COURT: The objection to the question will be sustained.

Q. Now, I am going to hand you what has been marked Plaintiff's Exhibit 19, Mr. McPhail. Will you please identify that for us?

A. Exhibit 19 is the agreement between The Detroit & Toledo Shore Line Railroad Company and its Trainmen and the Yardmen represented by the Brotherhood of Railroad Trainmen effective September 1, 1957.

Mr. LYMAN: May I see that document, [89] Mr. Curphey? (Thereupon, the said document was handed to Mr. Lyman by Mr. Curphey.)

Q. (By Mr. Curphey—Continuing) Now, handing you once again what has been marked Plaintiff's Exhibit 19, Mr. McPhail, and with specific reference to Article 25 on Page 22 of the exhibit, I will ask you whether there is any rule with reference to the establishment of facilities and in connection with establishing outlying terminals?

A. Yes, there is Article 25(b). It is a clause representing an agreement between the parties as to the establish-

Testimony of Clayton J. McPhail

ment of suitable quarters at terminals for employees going on and off duty, and it tells of the provisions that will apply when such quarters are established.

Q. Now, will you state whether or not you had in fact quarters at Trenton prior to last month?

A. No, we did not.

Q. Now, upon cross examination Mr. Lyman inquired at some length about the lack of claims with reference to Trenton.

I should like for you to explain to the Court why you hadn't had claims relating to a terminal at Trenton.

Mr. LYMAN: If the Court please, I don't think this witness is qualified by virtue of his position or any background testimony here to testify as [90] to why somebody else didn't file a claim, a time claim.

Mr. CURPHEY: I think the witness is entitled, Mr. Lyman, to testify on this point.

Your Honor, Mr. Lyman went into this arrangement upon cross examination for the purpose of creating—or for the purpose of showing such an agreement, I think, and I think I am entitled to explain it, or have the witness explain it, and I think—

Mr. LYMAN: (Interposing) If the Court please, I didn't go into the question of why someone, other than this witness, might have done or refrained from doing anything. This is obviously not asking for a fact within the witness's knowledge, but is just asking for some speculation by the witness, in the light of his own approach, as to why somebody else did or didn't do anything. It does not even ask for a fact, your Honor, but asks for an opinion.

Mr. CURPHEY: If your Honor please, it does ask for a fact, and I suggest that your Honor reserve ruling on this question until he hears the answer of the witness, at which time Mr. Lyman can make his motion to strike. I suggest that the answer of the witness will demonstrate it is a factual matter.

[91] The COURT: We are coming close to the edge, gentlemen, but I will reserve my ruling and the witness can proffer his answer and then I can determine the matter.

A. Well, I believe it is a matter of fact that, with the ex-

Testimony of Clayton J. McPhail

ception of the one day we established and operated the job at Trenton last month, there were no other occasions on which we did operate, and therefore there was no basis for any claims.

The COURT: I will overrule the objection. The answer may stand.

Q. (By Mr. Curphey—Continuing) Mr. Lyman also inquired on cross examination as to certain similarities or dissimilarities between the memorandum of agreement submitted on June 8, 1961, and the memorandum of December 16, 1965.

I want you to state briefly, Mr. McPhail, just what are, as a practical matter, the substantial differences between these two notices?

A. Number One, of course, was the confinement of the area.

Mr. LYMAN: The notices will speak for themselves. The witness has described their contents in detail. It does not serve any purpose, if the Court please.

The COURT: The objection will be [92] sustained.

Mr. CURPHEY: Before I excuse the witness, your Honor, I should like to offer into evidence Plaintiff's Exhibits 1 through 19.

The COURT: What about Exhibit 19?

Mr. CURPHEY: Including Exhibit 19. I beg your pardon.

The COURT: Any objection?

Mr. LYMAN: No objection.

The COURT: They will be received.

Mr. CURPHEY: You are excused, Mr. McPhail.

The plaintiff will now call Mr. Donald G. Vane.

The COURT: The witness may be sworn.

* * * *

Testimony of Donald G. Vane

[93]

UNITED STATES DISTRICT COURT
Toledo, Ohio
Thursday, October 6, 1966
1:45 o'clock P.M.

THEREUPON, the Plaintiff called as a witness, Mr. DONALD G. VANE, who, having been previously duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION.

By Mr. JOHN CURPHEY:

Q. Will you state your full name, please, and your address?

A. Donald G. Vane, 1245 Derby Road, Troy, Michigan.

Q. And your position, sir?

A. Labor Relations Officer for the Detroit & Toledo Shore Line Railroad.

Q. How long have you held this position?

A. Since September 8, 1965.

Q. Directing your attention to December 14, 1965, were you present during a conference with the Trainmen's organization?

A. Yes, sir, I was.

Q. Where was this conference held?

A. In the carrier's offices in Detroit, Michigan.

[94] Q. Who was present on behalf of the Trainmen?

A. Vice president F. C. Montgomery, general chairman William Upham, and vice chairman Ritchie.

Q. What was the subject matter of the conference?

A. The conference consisted of a number of subject matters and disputes and grievances.

Q. Was there a regular agenda in connection with the conference?

A. Yes sir, there was.

Q. Over what period of time—there was more than one conference. Over what period of time did the conferences take place?

A. The dates were December 14, 15 and 16, 1965.

Q. Handing you what has been received in evidence as Plaintiff's Exhibit 6, Mr. Vane, was this instrument submitted to you during the course of that conference?

Testimony of Donald G. Vane

A. Yes sir, it was.

Q. And what was the context of the discussion at that time, when it first arose?

A. As I recall it, on the afternoon of December 15th Mr. Upham asked that if he did submit a proposed agreement covering the establishment of assignments at Edison and Trenton would we give it consideration, and I told him that we would be glad [95] to give it consideration, and on the 16th after all of the matters on the agenda had been discussed, then the agreement was submitted.

Q. When it was submitted to you was any reference made to Mediation Case A-6755?

A. No, sir.

Q. Was any reference made to this mediation case in the context of this memorandum at any time during the conference?

A. No, sir.

Q. Was there thereafter any reference to Mediation Case A-6755 in reference to this memorandum of December 16, 1965?

A. No, sir.

Q. How was it treated thereafter?

A. Well, it was considered as a new proposal, a new dispute, and it was given consideration, and subsequently it was declined as submitted by the organization as being unacceptable.

Q. When was it declined, sir, as you recall?

A. I believe it was January, 1966; the exact date I am not sure of.

Q. Was it considered by you at any time as a part of Mediation Case A-6755?

A. No sir, it was not.

Q. How was it filed?

[96] A. Under a subject matter filed in their general files. If I remember correctly, the file number was 59.9.

Q. Following the declination to which you referred, Mr. Vane, was there any further handling of it on the property?

A. Not until submission of the ex parte matter through the NREB.

Q. Now, did there come a time thereafter that you received a request for a conference in Mediation Case A-6755?

Testimony of Donald G. Vane

A. Yes, on—I believe in the letter dated August 10, 1966, from B. R. T. vice-president Burke. A letter of August 10th, I should say.

Q. Was there any reference in that communication to the proposed memorandum agreement of December 16, 1965?

A. No, sir.

Q. Did you subsequently have such a conference?

A. Yes, sir, on September 16, 1966.

Q. Were there any other matters before you at that time?

A. No, sir.

Q. How did the conference begin?

A. Mr. Burke, the vice-president, asked if the carriers still intended to establish assignments at Trenton and he was informed that we would; and in fact it was contemplated that the bulletin would be issued the following Monday, on September 19th, with the assignments to be effective September 26th.

[97] Q. Were there any discussions or negotiations at that conference with regard to this proposed memorandum of December 16, 1965?

A. No, sir.

Q. Was there anything said by a representative of the Trainmen present at that conference which you construed as a strike threat?

A. Yes, sir.

Q. What, briefly, was said in that respect?

A. Well, after a short discussion when we could not agree, the representatives of the employees said that—"Well, then we know where we can go," and the remark was made, "Well, we'll see you in court," and they left the office at that time.

Q. Did you subsequently have any conversation with regard to the same subject matter with the defendant E. F. Gensler?

A. Yes; I believe it was on the afternoon of September 20, 1966.

Q. And what kind of a conversation was that?

A. Well, Mr. Gensler talked to me, and he stated that the bulletin—

Testimony of Donald G. Vane

Q. (Interposing) Let me interrupt you here, Mr. Vane. Was this over the telephone or a personal conversation, meeting, or what was it?

[98] A. It was over the telephone, long-distance.

Q. And which party called which?

A. Mr. Gensler called me.

Q. Will you state whether or not he identified himself over the telephone?

A. Yes, he did.

Q. Tell us briefly what he said with respect to a strike threat?

A. He stated that he was aware of the bulletin of September 19, 1966, being posted establishing the new assignments at Trenton, and that in the interest of better labor relations he wanted to inform us that if the bulletin was not removed by noon of the 21st of September it would be necessary for him to take strike action on Monday, the 26th.

Mr. CURPHEY: You may inquire, Mr Lyman.

* * * * *

CROSS EXAMINATION.

By Mr. RICHARD LYMAN:

Q. Mr. Vane, did you participate in the negotiations between the Shore Line and its operating employees and their representatives [99] in connection with the handling of the dispute in Mediation Case No. A-6755?

A. No, sir, I did not, other than the conference of September 16, 1966, with Mr. Burke.

Q. You did not. That was your first exposure to that particular dispute?

A. Insofar as being personally involved, yes, sir.

Q. When did you first assume your position? I don't recall what date you testified to.

A. September 8, 1965.

Q. So that you have no direct personal knowledge of what went on prior to that or during the handling of A-6755?

A. No, sir.

Testimony of Donald G. Vane

Q. From the time you went to work until this conference of December 14th to December 16th of 1965, had you had any discussions or conferences with anybody in the management of the railroad with respect to 6755?

A. Not on a formal basis, no, sir.

Q. On an informal basis then.

A. Oh, I certainly was aware of the case and the dispute, and the matter was discussed, of course, with my superiors and other members of the carrier family.

Q. What was the tenor of those discussions?

[100] Mr. CURPHEY: I object to this, your Honor.

Mr. LYMAN: I don't know why.

Mr. CURPHEY: It is irrelevant, what discussions the witness had or that they had with each other with regard to the pendency of any matters involving labor.

The COURT: I allow considerable latitude in cross examination.

The objection will be overruled.

A. Would you repeat the question, Mr. Lyman?

Q. What was the tenor of those discussions you had after you went to work?

A. I more or less——

Q. (Interposing) You say you had informal discussions on 6755.

A. It was more or less to determine exactly just what the dispute involved. I am sure you well understand the entire character of the Shore Line Railroad was new to me, never having been in this area before, and in order for me to be able to understand what was involved with Edison and Trenton it was necessary for me to discuss with various members of the carrier family the various physical characteristics and the past operation.

[101] Q. Was that case discussed with you as a pending and unresolved dispute?

A. Not that I recall, except that I did know, of course, that the Board had closed its files.

Q. With no agreement having been reached between the parties?

A. Yes, sir.

Testimony of Donald G. Vane

Q. Did you familiarize yourself with the subject matter of the dispute?

A. Yes, sir.

Q. Would you say that the subject matter of the dispute was different from the subject matter of Mr. Upham's proposal to you on December 16, 1965?

A. Yes; I considered it quite a bit different.

Q. Will you explain the differences to us?

A. Well, the agreement submitted in December, 1965, contained a great deal of differences as between the proposed agreement and the one submitted in June of 1961.

Q. Did those differences go to the subject matter of the respective proposals or to the particular items that were encompassed?

A. Well, they were different in subject matter. Actually, the only relation between the two matters so far as I can see [102] is that they both involved the Trenton station.

Q. And didn't they both consist of proposals for protective conditions and benefits for employees who would be assigned to Trenton station if they created Trenton as a terminal point?

A. Well, the original notice and the original proposal in 1961 was particularly applicable to two specified runs. This was not the case in 1965.

In 1961 it involved a change of assignment from one location to another. The 1965 proposal involved the establishment of additional assignments, and I considered that there was an extremely great deal of difference between the two.

Q. Did you base that distinction on the fact that these were different train numbers or what?

A. No, because the trains in 1961 were specifically designated, and it was specifically provided in the proposal that the trains would move from Lang to Trenton, indicating that this was a transfer of assignments, which was not in evidence in 1965.

Q. Mr. Upham's proposal to you, did that relate to particular train numbers?

A. No, it did not, which was one of the differences between that and the 1961 proposal.

Q. Did Mr. Upham's proposal, his written proposal to the carrier in 1961, deal with specific train numbers?

Testimony of Donald G. Vane

[103] A. Yes, sir, it did.

Q. Is that the only difference between the two proposals?

A. No, sir.

Q. Pardon?

A. No, sir.

Q. They might be different in terms of numbers of miles, or in number of cents and dollars and so forth, but didn't they both deal with the same subject matter of protecting employees who would be involved in the establishment of a terminal point at Trenton?

A. They both did contain protective clauses, yes.

Q. Now, the December 16th proposal to you from Mr. Upham did not have anything to do with the taxicab problem that was the primary purpose of your conference, did it?

A. The taxicab problem, Mr. Lyman, was not the primary reason for the three-day conference we had. It was one of the items, but not the primary one.

Q. Well, let me rephrase it. It didn't have anything to do with that item, did it?

A. Not as far as I could see.

Q. As far as the subject matter was concerned?

A. The taxicab problem was separate and covered by a Section VI notice, and the agreement of December 16, 1965, did not [104] involve the question of dead-head or the use of taxicabs.

Q. And it didn't involve DeRoad, did it?

A. No, it did not.

Q. It simply mentioned the establishment of a terminal at Trenton?

A. Yes, sir.

Q. And the 1961 proposal, as you became familiar with it, was also limited to the establishment of a terminal point at Trenton, was it not?

A. Yes, it was.

Q. Did you understand when you talked with Mr. Upham on December 15th and when he gave you this proposal on December 16th that this was to be and turned out to be a proposal strictly related to Trenton and the terminal establishment there which had been the subject of 6755?

A. Well, there could be no doubt, Mr. Lyman, in Decem-

Testimony of Donald G. Vane

ber, 1965, to where it referred, because it was spelled out, if I recall correctly, in Item No. 1 of that proposal; but there was no question in my mind as to the—or as to what the proposal covered or the area where it covered.

Q. You knew it was a throwback to the dispute unsuccessfully processed through mediation, didn't you?

A. Well, no reference was made by the employees to that effect.

[105] Q. I didn't ask you that. You knew that was the fact, did you not?

A. Really I must answer properly, that at the time I did not. I had—in fact, I had not even at the time had an opportunity to research the files to familiarize myself with the—with any older disputes.

Q. So on December 16th when this was handed to you and you reviewed it you had no knowledge then that it had ever been the subject of any discussions or disputes?

A. Only by vague conversation, but I didn't know what the handling of the dispute had been up until that time or what the status of it was.

Q. So it would be natural to treat it, as you did, as a new matter because you had so little familiarity and knowledge of this whole matter?

A. And because of the fact that the employees did not indicate that it was a part of any previous dispute.

Q. After you had a chance to familiarize yourself to a greater extent with the previous dispute and studied this new proposal, Mr. Vane, wouldn't you say that it dealt with the same subject matter as this previous dispute which had gone through mediation and had wound up without any agreement being reached?

[106] A. In a general sense only.

Q. The specific provisions of the proposal then and the proposal that the employees had given the company back in the spring of 1961 did have variations?

A. They did have.

Q. But the general subject matter was the same, was it not?

A. Generally.

Q. And did you consider this as a matter which would

Testimony of Donald G. Vane

be in agreement, in settlement, of the dispute in Mediation Case No. 7711 had you agreed to it?

A. Would you repeat that question?

(THEREUPON, the last question was read by the Reporter to the witness.)

A. In other words, are you stating, Mr. Lyman, that if we had reached agreement in 7711 would this have disposed of No. 6755?

Q. No. I think what I am saying is, would an agreement such as proposed on December 16th by Mr. Upham have covered and dealt with the issues that were involved in Mediation Case No. A-7711?

A. Well, actually, Mediation Case 7711 involves, according to my recollection, the employees' Section VI notice of January, 1966, and a carrier Section VI notice that was [107] submitted, but these are the only two items that are actually involved in 7711.

Q. And that proposal and the counterproposal were completely foreign to the subject matter of the December 16th proposal that Mr. Upham handed you?

A. Yes.

Q. Would it be accurate to say that rather than settling or disposing of Case 7711, an agreement between you and Mr. Upham in terms of his December 16th proposal to you would simply have mooted 7711, because you no longer would have continued running the taxicab operation if you had gone to Trenton instead of DeRoad?

A. Well, I don't know whether I am qualified whether—or whether I am qualified to say, Mr. Lyman, that this would have disposed of the taxicab operation, because that is an area outside of my work.

It may be possible that the carrier might have continued an operation which would have required a taxicab dead-head.

Q. But the purpose of it was to get employees from DeRoad to Trenton?

A. Correct.

Q. Trenton at that time not being a terminal point?

A. Right, correct.

Testimony of Donald G. Vane

[108] Q. If you had signed this agreement with Mr. Upham providing protective conditions for employees at Trenton in the initiation of Trenton as a terminal point, you would not have had this taxicab thing involved, would you?

A. As I say, this would be a matter for an operating officer to determine.

Q. Now, I think you have testified that it was December 15th when Mr. Upham asked you if you would consider a proposal of this sort if he prepared one and submitted it to you.

Was that at the conclusion of your conferences, or how did that conversation come up?

A. I don't recall, Mr. Lyman, the exact contents of what was being discussed on the 15th when Mr. Upham made that proposal.

As I recall, it seems to me like it was toward the end of the afternoon.

Q. Do you remember the words he used in discussing this with you, sir?

A. Not verbatim, but just generally to the effect that if he did bring in a proposal would we consider it.

Q. Did you understand from his conversation that he was referring to a possible settlement of some dispute of some long-time standing?

A. No reference was made to any previous dispute.

[109] Q. Did this come to you as a bolt out of the blue?

A. Well, yes, sir, because it was not on the agenda, and nothing that I recall came up that would have precipitated it.

Q. Had you had in your mind at all prior to then the possibility of establishing a terminal point at Trenton?

A. Not specifically in the immediate future, no, sir.

Q. In other words, you had just taken over in your job and they were running out of DeRoad and a problem had arisen as to the operation and the conditions to be attached to that operation out of DeRoad and that's all you knew about it?

A. Yes, sir.

Mr. LYMAN: That's all.

Testimony of Donald G. Vane

Mr. CURPHEY: No further questions. Thank you, Mr. Vane.

The COURT: You may stand down, Mr. Vane.

Mr. CURPHEY: Plaintiff rests, your Honor.

Mr. LYMAN: Could we have a five or ten-minute recess, your Honor?

The COURT: Very well. Court will be in recess.

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DEFENDANT'S EVIDENCE

[110] Mr. LYMAN: If the Court please, I should apologize for not having used the recess to better advantage. We were discussing where we went from here and I haven't had an opportunity to ask the Clerk to mark a couple sets of exhibits.

The COURT: You may have him mark them.

Mr. LYMAN: I understand these will not be challenged for materiality or authenticity, as stipulated?

Mr. CURPHEY: That is correct. It [111] will expedite your presentation. It is agreeable with me to just put these into evidence without identification, with one exception.

Mr. LYMAN: What is the exception?

Mr. CURPHEY: The exception is the strike ballot of the Firemen dated February 5, 1966.

Mr. LYMAN: Let me see.

Mr. CURPHEY: I would object to that on the ground that it is irrelevant as to any matter in issue.

The COURT: Perhaps they should be numbered anyhow.

Mr. LYMAN: Very well, your Honor. Then you can object to that one. I understand that you are stipulating that we may offer them without an identifying witness, and subject, of course, to the Court's ruling on them.

Mr. CURPHEY: I am not going to object to them except for the one. You just offer them.

The COURT: Get them numbered. Then we will know which one that is and you can object to it by number.

Mr. LYMAN: There is a set for the [112] Court to have in front of him.

The COURT: Let him mark the one used as exhibits and you can put a corresponding number on the ones you want me to use.

Do you want to follow along so that you can get yours numbered, too, Mr. Curphey?

Mr. CURPHEY: Yes, your Honor.

Mr. LYMAN: I think we had better make them A, B, C and so on, because Mr. Curphey has one that he wants to object to. I will not put "Defendants" on them; I will just put "A, B, C" on them.

Defendant's Evidence

The COURT: That is satisfactory for my copies.

Mr. LYMAN: If the Court please, we have two sets of exhibits which we have had marked for the defendants at this time. One set corresponds with Exhibit A and so on down through to Exhibit O, which is a set of exhibits dealing primarily with—as Mr. Curphey has described it, the action of the Locomotive, Firemen & Enginemen.

Then we have another set of exhibits concerned with the Trainmen's case marked Exhibits AA through Exhibits ZZ. We came out right on the line.

[113] And in accordance with the stipulation in court today, I would like to offer those at this time and hand the Court his copies of what have been marked by the Clerk, and I move their admission subject to the objection of Mr. Curphey with reference to one of them.

The COURT: As I understand it, one of these you consider as irrelevant, Mr. Curphey?

Mr. CURPHEY: Yes, your Honor.

The COURT: Which one is the one you have in mind?

Mr. CURPHEY: Exhibit D, your Honor.

The COURT: Exhibit D.

Mr. CURPHEY: We have no objection to any of the offered exhibits with that exception; but I think Exhibit D is irrelevant. It contains a number of self-serving statements. It is a communication between the members of the union, or between the chairman of the union to members thereof, in which he recites his views on certain disputes. As I say, it is a self-serving declaration on his part. It is not pertinent to any of the issues here, your Honor, and I object to them.

The COURT: What do you say in support of this exhibit?

[114] Mr. LYMAN: We are faced with an injunction action here, the seeking of an injunction against a strike, and the plaintiff is attempting to show that the strike is for an illegal purpose.

I think that the ballot circulated to the membership of the defendant unincorporated association is relevant, and perhaps the most relevant thing here is to show what this alleged threatened strike is all about and what its purpose is, what its causes are, and why it is about to be indulged in.

The method of communicating to members of a labor

Defendant's Evidence

union in connection with a proposed strike is, of course, by strike ballot calculated to inform the membership what the nature of the dispute is and what they are being asked to authorize a strike call for. I think it is very relevant for that purpose.

The COURT: I have some questions about its relevancy, but I think I will reserve my ruling until I have had a chance to look at it with some degree of care and relate it to these other exhibits.

It is possible that as part of a series of exhibits it might have a relevancy that it wouldn't have standing by itself. [115] Mr. LYMAN: I might say that there are documents in these two sets of exhibits which are not dated. I think they are self-explanatory. I am referring to Agreement Proposals. I think one, at least—probably both of them—we have in the carrier's exhibits.

Some are overlapping, but perhaps it is desirable to put in complete sets, your Honor, rather than try to split them up.

The COURT: Yes.

Mr. LYMAN: But I am sure they will be self-explanatory to the Court.

With that understanding, then, these may be received?

The COURT: Yes. Of course, with the exception of Exhibit D, these exhibits will be received in evidence.

Mr. LYMAN: Yes, and the ruling is reserved on Exhibit D?

The COURT: That is correct.

Mr. LYMAN: We call Mr. Upham to the stand for direct examination.

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Testimony of William J. Upham

[116] THEREUPON, the Defendants called as a witness, WILLIAM UPHAM, who, having been previously duly sworn by the Clerk, testified further as follows:

DIRECT EXAMINATION.

By Mr. LYMAN:

Q. You are the Mr. Upham who testified this morning on cross examination, is that correct?

A. Yes.

Q. Mr. Upham, this morning Mr. Curphey asked you whether you intended to strike and the circumstances under which you would, and why.

Do you have authority under the laws of your organization to make these decisions for yourself, or the decision of whether to call a strike on the property which you represent?

Mr. CURPHEY: I object to that question as irrelevant, your Honor, and particularly in view of the fact the objection this morning was—we didn't get into that area because of the answer of the witness. I think the whole question of strike authorization is irrelevant.

[117] Mr. LYMAN: This question, your Honor, —

The COURT: (Interposing) He may answer.

Q. (By Mr. Lyman) Would you answer the question, Mr. Upham?

A. Do I—

The COURT: (Interposing) Better read the question to him, Mr. Archambault.

(THEREUPON, the last question was read by the Reporter, as follows: "Q. Mr. Upham, this morning Mr. Curphey asked you whether you intended to strike and the circumstances under which you would, and why.

"Do you have authority under the laws of your organization to make these decisions for yourself, or the decision of whether to call a strike on the property which you represent?")

The COURT: You can answer that question Yes or No.

Testimony of William J. Upham

A. No.

Q. Subsequent to the carrier's bulletin of September 19th did you receive any authority to call a strike?

[118] A. No.

Q. You did not?

A. Not to the 19th.

Q. Subject to the carrier's bulletin of September 19, 1966.

A. Oh. After they put the bulletin out we did receive authority from the Grand Lodge.

Q. You did?

A. Yes.

Q. What form did that authority take? How did you get the authority?

A. By telegram.

Q. From whom?

A. From the president of the brotherhood.

Mr. LYMAN: May we have this marked, perhaps AAA?

The CLERK: Yes. (So marking said document for identification.)

Q. (By Mr. Lyman—Continuing) I show you what has been marked for identification Defendants' Exhibit AAA, Mr. Upham, and ask you if that is the telegram you received from president Luna.

A. Yes.

Mr. LYMAN: We offer Defendants' [119] Exhibit AAA into evidence, your Honor.

Mr. CURPHEY: We object to it, your Honor, on the ground that it is self-serving.

The COURT: Objection overruled.

Q. (By Mr. Lyman—Continuing) Mr. Upham, you were asked this morning about the conferences of December 14th, 15th and 16th, at the conclusion of which on December 16th you submitted a proposed agreement covering the establishment of a terminal at Trenton and protective conditions for employees in connection with such a terminal, and you stated, I believe, that you weren't at that time trying to re-open negotiation on Case No. A-6755, which had gone through mediation and the Board had closed its files.

Testimony of William J. Upham

Now, between that time and the prior date on which the Board had closed its files had either party to your knowledge made any attempt to reopen negotiations on that matter?

A. Not to my knowledge, no.

Q. You had had no request for a conference from the carrier and you had made no request of them during that period, from the Board's closing of its files in 1963 until you came up with this proposal on December 16, 1965?

A. No.

Q. Is that correct?

[120] A. Yes.

Q. Why hadn't you made any attempt to reopen that matter during that period of time?

Mr. CURPHEY: I object to that question, your Honor.

The COURT: Sustained.

Q. (By Mr. Lyman—Continuing) During that period of time, Mr. Upham, had the carrier done anything or given you any indication for concern about the reopening—or the opening of the terminal point at Trenton?

A. No, not to my knowledge.

Q. Is that why you hadn't called a strike during that period of time, after the Board's efforts had terminated?

A. Well, that was one of the reasons; another one was that there wasn't a chairman for that length of time.

Q. During the period in which you were the chairman you had been advised, had you not, of Mr. McPhail's statements about the time that case was closed that the matter was moot and—

Mr. CURPHEY: (Interposing) This is extremely leading, your Honor, and I certainly object to it on that ground.

The COURT: Sustained.

[121] Q. (By Mr. Lyman—Continuing) Had you received communications or been aware of communications from Mr. McPhail in connection with the termination of mediation in Case No. A-6755?

A. Yes.

Q. What was the gist of those communications?

Testimony of William J. Upham

A. There's a letter in the file from Mr. McPhail to the Mediation Board claiming that they no longer contemplate making a change in the terminal, so thereby they considered the issue moot, the carrier considers the issue moot.

Q. What was the reaction of yourself to that statement of Mr. McPhail's?

Mr. CURPHEY: I object, inquiring about a witness's subjective intent.

Mr. LYMAN: You did it all morning, Mr. Curphey, with Mr. McPhail.

Mr. CURPHEY: No, that is not true, Mr. Lyman.

The COURT: Sustained.

Q. (By Mr. Lyman—Continuing) Did that communication or the knowledge of it motivate your decision as to whether or not to go ahead and strike over the issues involved in Case No. A-6755?

[122] A. Yes.

Q. Now, this morning you testified that during the conferences that you had with Mr. Vane from December 14th to the 16th you made no reference to Case No. A-6755 in connection with your suggestion to him that you might submit a written proposal and your subsequent submission of it on the next day, December 16th.

Did you have any further discussions, aside from referring to that case by its Mediation Board number, by way of explanation or discussion with Mr. Vane either on the 15th or on the 16th of December, 1965?

A. Yes. On the afternoon of the 15th when we discussed about bringing in a proposal to take care of the issue at hand I didn't refer to Mediation Case No. A-6755, but we did refer to the subject matter in there, and it was understood that if we were to settle the taxicab issue—or if we handled this proposed agreement that we had that it would settle everything, the 6755. That was the understanding, but it was not referred to by the number.

Q. Did Mr. Burke—or I mean Mr. Vane—did Mr. Vane make any statements to you or in your presence to the members of your committee indicating that he was aware of the existence of a previous dispute over the establishment of a terminal at Trenton?

Testimony of William J. Upham

[123] A. Yes, he did. He said—or the point was brought to him that this whole argument and issue was the management's attempt to establish the jobs at Edison, and he was told that he was beating around the bush, and that—

Mr. CURPHEY: (Interposing) I object to this continuous unresponsive answer, your Honor.

Q. Would you identify the people that communicated this to him, Mr. Upham? Was it members of your committee that told him these things or yourself?

A. I told Mr. Vane that he was beating around the bush by having taxicabs transport the men from DeRoad to Edison, when in reality what he wanted was to start the jobs at Edison.

Q. Did he respond to that?

A. Yes, he did.

Q. What did he say to that?

Mr. CURPHEY: I object to this relation of a conversation about negotiations, your Honor. It has to do with the negotiations. If we continue with this line of questioning this witness will testify as to the actual negotiations between the parties, which are substantially self-serving from his point of view, your Honor, in view of the dispute here.

[124] Mr. LYMAN: Counsel for the plaintiff here opened the door to this line of inquiry by his own examination of the witnesses, asking what went on at this conference, if the Court please, and he got information on it.

Mr. CURPHEY: I attempted to.

Mr. LYMAN: You explained it thoroughly, as I recall.

Mr. CURPHEY: I object to this. I kept the inquiry immediately on the issue.

Mr. LYMAN: He went into this thoroughly on the question of this conference, whether it involved A-6755 and so on.

Now if he says this examination is foreign to those questions, if the Court please, he is merely adopting a subterfuge in relying upon the technicality that he was referring to it by a case number. I am seeking to elicit this, whether by number or not, that they did discuss the old dispute.

The COURT: One of the problems you confront when you go into what was said at a conference or meeting is that

Testimony of William J. Upham

it is hard to say where the line is to be drawn. [125] I will overrule the objection and let the testimony continue.

A. If I could have the—could I have the stenographer read back where I left off?

The COURT: Would the Reporter read back the last question, and the answer thereto, if any was given?

(THEREUPON, the last question was read by the Reporter, as follows: "Q. What did he say to that?")

A. He said that he knew that. In reality, what he wanted was the jobs to start at Trenton, or at Edison. In other words, he was aware of it.

Q. And was it following that conversation that you went back and prepared a proposal and submitted it to him the next day?

A. Right.

Q. Was that proposal discussed during the day of the 16th of December, Mr. Upham, or was it simply submitted to him at the negotiations or discussion at that time for his consideration?

A. It was discussed and actually negotiated on.

Q. On the 16th of December?

[126] A. On the 16th of December.

Q. How long did you negotiate about it?

A. Well, I would say part of the afternoon.

Q. Was this the last item on the agenda of that conference, Mr. Upham?

A. Yes.

Q. How did those negotiations conclude?

A. Well, Mr. Vane said that he would write us and let us know, or he would acknowledge the conference, that there was some of the items that were too prohibitive—or restrictive—and some of the items we had actually negotiated on and came to an agreement on.

Q. You mean you had gotten a tentative agreement on certain items in your December 16th written proposal, subject to whether or not you had reached an agreement on the rest of them?

A. Right.

Q. Now, Mr. Upham, after that date did you take part

Testimony of William J. Upham

in any further negotiations with the carrier on Mediation Board Case No. A-6755?

A. I believe there was one more meeting held in April, and that was more of a lining up of an agenda with the vice president, new vice president, that came onto the property to assist the committee.

[127] Q. Was this a meeting at which the carrier was represented, Mr. Upham, or was it a meeting of the organization?

A. It was a meeting with the carrier and the vice president and myself.

Q. This was in April of 1966?

A. I believe so. The carrier's reply is May 31, 1966.

Q. This was confirming the subject matter of a prior conference at which you were in attendance?

A. Yes.

Q. At that time, among other items, you did discuss Case No. 6755?

A. We discussed the subject matter to that case, yes.

Q. When you say "subject matter", Mr. Upham, you mean the establishment of a terminal at Trenton?

A. Yes.

Q. Now, prior to the institution of this lawsuit did the railroad or its officers at any time tell you, Mr. Upham, that they couldn't deal with you on the December 16th proposal because you hadn't served a Section 6 notice on it?

A. No.

Q. Is this lawsuit the first occasion you have had to receive any such objection to negotiation on that?

A. Yes.

[128] Q. Has the carrier at any time prior to this lawsuit claimed that Mediation Board Case No. A-6755 was completely different from any current matters with which they were dealing with you?

A. I don't believe I understand that.

Mr. CURPHEY: I object to the question for the reason that it is asking for a conclusion on the point at issue.

Mr. LYMAN: I withdraw the question, Mr. Curphey. I will withdraw the question, if I may.

Q. (By Mr. Lyman—(Continuing)) Mr. Upham, have you

Testimony of William J. Upham

at any time indicated to the carrier that you were claiming that the establishment of a terminal point at Trenton would be in violation of the rules of your current schedule agreement?

A. No.

Q. Did you ever indicate to them that you would strike in opposition to their establishment of such a terminal as being in violation of your current agreements?

A. The only time I would say it could be construed as that was from the meeting of September 16th.

Q. That was this last month, this year?

A. Right.

[129] Q. Now, who attended that meeting?

A. Vice president Burke, Mr. Vane, and myself.

Q. What was the gist of the conversation at that meeting?

A. The conversation—or the gist of it was that if the carrier did not sit down and attempt to come to an agreement and unilaterally put this change into effect, we would have to seek protective conditions for our employees.

Q. Did you explain to the carrier at that meeting the kind of an agreement that you said they would have to put into effect?

A. No; I didn't go into the actual items of the agreement.

Q. Did you refer back to any previous dispute or previous proposed agreements in connection with this conference, Mr. Upham, at that time?

A. We referred back to Mediation Case A-6755.

Q. Did you consider at that conference the proposal that had been made to the carrier in the spring of 1961 during the handling of that case?

A. We—I don't believe we actually brought the agreement out and considered it. We were informing the carrier that we have rights to bargain with them, and the carrier—Mr. Vane—said he didn't think we did have rights to bargain, and he said he was going to go to court.

Q. Did he give any reason for his position that you had no [130] right to bargain?

Mr. CURPHEY: I object to this, your Honor. It is not only hearsay but asking or trying to elicit a legal

Testimony of William J. Upham

opinion supposedly coming from the mouth of an officer of the carrier. It is completely objectionable.

Mr. LYMAN: I don't know what he said.

The COURT: The objection will be overruled.

A. Can I have it again?

(THEREUPON, the last question was read by the Reporter.)

A. Yes. He said that was the carrier's prerogative to establish a terminal anyplace that they wanted to and that it was their right to do so, and that it had nothing to do with the employees or their representatives. It was just strictly a managerial problem.

Q. Had the carrier or any of its representatives previously advanced that argument against your proposals in Case No. A-6755?

A. Not to my knowledge.

Q. Is that the first time that you had met that argument?

[131] A. Yes, sir.

Q. Did you at that conference discuss any specific items of an agreement such as you say you told him you would have to have?

A. No.

Q. You didn't go into the individual items of protective conditions or mileage allowances or one thing or another?

A. No.

Q. When that conference concluded were there any other arrangements for discussion on the subject?

A. No.

Q. Did you participate in any subsequent conferences—

A. No.

Q. (Continuing)—with the carrier on this subject?

A. No.

Mr. LYMAN: Excuse me for a moment, your Honor.

Q. (By Mr. Lyman—Continuing) One more thing I want to clear up for the record, Mr. Upham.

We have had descriptions here today in the testimony about Edison Station and Trenton. Is Edison something

Testimony of William J. Upham

different from Trenton? What is the physical arrangement there?

A. Well, Edison is the station on the Shore Line within the [132] city limits of the City of Trenton, but they are a mile or so down the road. There is another station called Trenton, but they are for the purpose of train orders, cross-overs and such as that, but it is all in the immediate area.

Q. Is Edison station the point at which all of these discussions about Trenton have revolved? In other words, was the proposal to establish a terminal there at all times limited to the so-called Edison Station?

A. Yes.

Q. And this other point a mile away that you mentioned was never proposed as a terminal point?

A. No.

Q. And did you sometimes interchangeably refer to this terminal as Edison Terminal or Trenton Terminal?

A. Yes.

Q. Without intending any distinction between the two?

A. Yes.

Mr. LYMAN: That's all, Mr. Upham.

The COURT: Any cross examination, Mr. Curphey?

Mr. CURPHEY: Yes, your Honor.

* * * * *

[133] CROSS EXAMINATION.

By Mr. JOHN M. CURPHEY:

Q. Did I understand you to say, Mr. Upham, that during this conference of September 16th that Mr. Vane for the first time took the position that this was a nonbargainable issue; is that your testimony?

A. Mr. Vane said that he felt that he didn't have to bargain on it.

Q. Yes. He took the position that the carrier had the right to establish this terminal?

A. Yes.

Q. And he had constantly taken that position throughout, had he not?

A. Yes.

Testimony of William J. Upham

Q. And he advised you in writing of that, or Mr. McPhail did on January 6, 1966, did he not?

A. Yes.

Q. And you took the position on the other hand that he had to bargain with you on that, didn't you?

A. Yes, sir.

Q. And the December 16, 1965, memorandum was the specific matter that you had submitted in that connection, isn't that true?

[134] A. Repeat that, please.

Q. The December 16, 1965, memorandum was the specific matter or your specific proposals which you had submitted to the carrier, isn't that true?

A. In connection with the 7711 mediation case.

Q. Well, when you submitted that memorandum, Mr. Upham, you did not refer to that mediation case, did you?

A. Not as a number, no.

Q. It is your testimony that the two matters involved similar subject matter, involving the establishment of a terminal at Trenton?

A. Yes, sir.

Q. But you didn't refer to that mediation case when you submitted it; we understand that?

A. Not by number, no.

Q. And you did not mention the number or reopen the negotiations, did you?

A. No.

Mr. CURPHEY: I believe that's all I have of this witness, your Honor.

The COURT: You may step down, Mr. Upham. You may call your next witness.

Mr. LYMAN: I call Mr. Burke.

* * * * *

Testimony of James E. Burke

[135] THEREUPON, the Defendants called as a witness, JAMES E. BURKE, who, having been previously sworn by the Clerk, testified as follows:

DIRECT EXAMINATION.

By Mr. RICHARD LYMAN:

Q. Mr. Burke, will you state your name and address?

A. James E. Burke, 20874 Bottsford Drive, Farmington, Michigan.

Q. What is your position, Mr. Burke?

A. Vice president of the Brotherhood of Railroad Trainmen.

Q. How long have you held that position?

A. Alternate vice president from January 1, 1965, and vice president since January 1, 1966.

Q. Briefly, what are your duties in that position you hold with the Brotherhood?

A. Primarily to assist the general committees in handling negotiations with the carriers, and other matters related to general committee functions.

Q. In that capacity, Mr. Burke, were you assigned to work with members of your organization on the Detroit & Toledo [136] Shore Line Railroad?

A. I was.

Q. And when was that?

A. I believe it was either in March or April.

Q. Of this year?

A. Of this year.

Q. In the course of that assignment did you become familiar with the matters which have been testified to here today and which you have heard in this courtroom?

A. Yes, I did.

Q. How did you become aware of those matters?

A. Well, I first consulted with general chairman Upham and we had a meeting with Mr. Vane of the carrier, at which time we went over various matters to determine the status of each item, which ones were pending for further work, and what-not.

Q. When was that meeting?

A. I am not certain of the date, but I believe it was in

Testimony of James E. Burke

April. I know it is covered by the carrier's confirming of the conference in May of this year.

Q. I show you what has been introduced into evidence as Defendants' Exhibit WW, Mr. Burke. Is that a copy of that letter?

A. Yes.

Q. Directing your attention to the last paragraph on the [137] second page of that letter. Could you explain what discussions, if any, took place at the conference with respect to the subject matter of that last paragraph?

A. The discussion of this particular matter was primarily between general chairman Upham and Mr. Vane, Mr. Upham broaching the subject of attempting to consummate an agreement for protective conditions in the event the terminal was established at Edison.

I did participate somewhat in the discussion to the point of expressing my views to Mr. Vane, but in view of the—

Mr. CURPHEY: (Interposing) Just a minute. I object to the witness's views.

Mr. LYMAN: I think it is quite relevant to know what he said to Mr. Vane on the subject of this dispute which you are trying to categorize as falling in one subject matter, and we are trying to show a different subject matter.

The COURT: Overruled. He may answer the question.

A. (Continuing) Well, I said to Mr. Vane that in view of the additional mileage and additional expense which would result as a result of this change, we certainly felt that we were entitled to some protective conditions for these employees.

[138] Q. That was in connection with the establishment of a terminal at Trenton?

A. Yes, it was.

Q. Do you recall how this subject matter came up? Did you initiate it or did the carrier initiate it?

A. No. I believe as we went over the other items to line them up for handling in the future general chairman Upham brought up the matter.

Q. Did you discuss this matter in terms of National Mediation Board Case No. A-6755?

A. Not specifically by number, no.

Testimony of James E. Burke

Q. Did you discuss the fact that it had been—or that it was a dispute which had been through the arbitration process without agreement having been reached?

A. At that time I don't recall any mention being made of the processes, but it was very clearly stipulated and agreed by all that this was a pre-existing dispute, something which had not been settled.

Q. Did the carrier at that conference indicate to you and your committee whether they intended to proceed with the establishment of a terminal at Trenton?

A. That has been my understanding right from the very first.

Q. Well, just a minute, Mr. Burke. My question was phrased [139] in terms of whether the carrier communicated something to you at that conference. I think you had better limit your answer to that question.

A. Would you repeat the question?

(THEREUPON, the last question was read by the Reporter, as follows: "Q. Did the carrier at that conference indicate to you and your committee whether they intended to proceed with the establishment of a terminal at Trenton?")

A. I can't say—

The Court: You can answer that Yes or No.

A. (Continuing) I can't say whether it was stated at that specific meeting; I know it was at other times.

Q. (By Mr. Lyman—Continuing) But you did discuss at that conference the possibility of such a move, and the matter of protecting employees that might be involved in it?

A. Yes.

Q. Now, did you have subsequent conferences with the carrier or communications, to them or from them, dealing with this subject matter?

A. Yes. I believe on August 10th I wrote to Mr. McPhail advising him that in checking the general committee files I [140] found that Mediation Case No. A-6755 was included among my assignments and requested a date for conferences with him.

Q. Is this document which has been introduced in evi-

Testimony of James E. Burke

dence as Exhibit YY, Defendants' Exhibit YY, a true copy of that letter that you wrote to Mr. McPhail?

A. Yes, it is.

Q. Now, as a result of that did you have a conference on Case No. A-6755?

A. Yes. As a matter of fact, that letter was hand delivered to Mr. Vane. As I recall it, it was either on August 10th or on August 11th. Upon delivering the letter to him, we then discussed the situation at Trenton.

Q. Did you deliver it to him personally by hand?

A. I did.

Q. What was the nature of the discussion you had with him at the time of that delivery?

A. It followed the course of the previous discussion to the extent that we restated our position that we were entitled to protective conditions for travel allowances, travel time.

It was also acknowledged during the conversations that the carrier would have to establish the terminal to take care of the Monsanto business, or they were desirous of doing so [141] at least, by October 1, 1966.

Q. And what was the result of the conference? Did an agreement—was an agreement reached as a result of that conference?

A. No. We merely discussed it. The meeting was—it was for another purpose.

Q. Did you have any subsequent meetings and conferences with the carrier on the subject matter of protective conditions in connection with the establishment of a terminal at Trenton?

A. Yes.

Q. When was that?

A. On September 16, 1966.

Q. Would you tell us what the nature of that meeting was? Was it for that specific purpose, Mr. Burke, or did it have to do with other subject matter?

A. It was for that specific purpose, and it was as a result of the letter that I sent requesting a conference date.

Q. When you say "sent" you mean you hand delivered a letter to Mr. Vane?

A. Yes.

Testimony of James E. Burke

Q. Who was present at this later conference?

A. Mr. Vane, general chairman Upham, and myself.

[142] Q. What was the nature of the discussion that went on there at that time?

A. We first advised Mr. Vane that we had Mediation Case No. A-6755, that it was a live issue, and the Mediation Board had exhausted its efforts and withdrawn. We were therefore legally free to strike if the terminal was established without the benefit of an agreement providing for the protective conditions we had been seeking.

We stated that we knew that the carrier contemplated making the change by October 1st, and that we were desirous of consummating an agreement in order to avoid any turmoil or strike activity.

Mr. Vane replied that—well, to the effect that he inquired as to whether or not we had an agreement to propose or discuss. I said that we had nothing in writing, nothing specifically in writing at that time, but that we would have to insist upon the basics of travel allowance, travel expenses, and insurance coverage; that if he were willing to meet with us I had no doubts that the matter could be reconciled.

Mr. Vane then stated that it was the carrier's position—

Mr. CURPHEY: (Interposing) I object to this for the record. It is terribly self-serving, argumentative and prejudicial.

[143] The COURT: You went into these negotiations. Once we get into them, it is hard to say where one stops. I will overrule the objection.

A. (Continuing) Mr. Vane then stated that the carrier was standing by its contentions that they could effect the change without giving us the protective conditions requested; further, that he did not think that our rights under Mediation Case No. A-6755 would allow us to legally strike, because that notice was predicated upon a change to Edison, whereas the change which would be made on the first would be to Trenton.

At that point I told Mr. Vane that—well, first of all, he also advised us that facilities would be provided at Edison which the Trainmen could stay at without cost, thereby

Testimony of James E. Burke

eliminating the necessity of them travelling back and forth from home to Edison during the week.

I stated to Mr. Vane that—that we didn't think our people should live like gypsies, and we didn't agree with his interpretation as to the validity of Mediation Case No. A-6755, and that if the change were placed into effect without the agreement we would exercise our rights through our economic strength.

We then commented to each other that we would next meet on the picket line or in court.

[144] Q. Were there any subsequent meetings on this subject matter prior to the filing of this suit?

A. No, sir.

Q. What did you do, if anything, in connection with this proposal to establish a terminal point at Trenton, as illustrated by the carrier's September 19th bulletin, following the conclusion of this last conference with the carrier, Mr. Burke?

A. We conferred with our legal counsel at the grand lodge headquarters in Cleveland.

Mr. CURPHEY: I object to this.

The COURT: Sustained.

Q. (By Mr. Lyman—Continuing) What action, if any, did you take following this conference, Mr. Burke, in connection with this matter?

A. I wired the president of the Brotherhood requesting strike authority.

Q. Mr. Burke, I show you what has been marked by the Clerk as Defendants' Exhibit BBB. Is that a true copy of the telegram you addressed to President Luna?

A. Yes, it is.

Mr. LYMAN: I offer this in evidence at this time, your Honor.

[145] Mr. CURPHEY: No objection.

The COURT: It will be received in evidence.

Q. (By Mr. Lyman—Continuing) Did you have any further communication with President Luna in response to that telegram?

A. No, sir, I did not. I was in Wisconsin at the time

Testimony of James E. Burke

it was sent, and it was arranged that the—that if the authority, if it would be granted, it would be given directly to general chairman Upham through a telegram.

Q. And subsequent to your sending this telegram, Mr. Burke, have you ever had anything to do with this dispute, other than——

A. No, sir.

Q. (Continuing) —other than in connection with this lawsuit?

A. After it was filed, no.

Mr. LYMAN: Excuse me for just a moment, if your Honor please.

(THEREUPON, Mr. Lyman conferred off the record with cocounsel.)

Mr. LYMAN: (Continuing) I think that's all we have with this witness, your Honor.

The COURT: Cross examine.

* * * * *

[146] CROSS EXAMINATION.

By Mr. JOHN M. CURPHEY:

Q. Now, Mr. Burke, with reference to this conference you had in May—you were uncertain as to the date—that was with reference to the number of the pending disputes?

A. Yes.

Q. Was this your first conference with representatives of the carrier, when you had this position as to a large docket?

A. I believe it was; I couldn't say for a certainty, though.

Q. Had you reviewed your file prior to the May conference, or whenever it was, as to pending disputes?

A. Yes. I had Upham clarify for me what matters were to be handled and in what sequence.

Q. And Exhibit WW, to which you referred, was a letter addressed to you from Mr. McPhail of the carrier summarizing a number of the matters discussed during that conference in May, is that true?

A. Yes.

Q. And there were a number of disputes discussed in

Testimony of James E. Burke

this letter, were there not? In fact, there are five or six or seven different matters discussed?

A. That's right.

[147] Q. Now, there is no reference in this letter to Mediation Case No. A-6755, is there?

A. Not by number, no.

Q. There is a reference in the last paragraph to the matter of establishing a terminal at Edison, isn't there?

A. Yes, there is.

Q. And you hadn't requested a conference at that time on that mediation case, had you?

A. No, we hadn't.

Q. And you then knew, subsequent to that conference anyway or after you received this letter, that the carrier intended to establish a terminal at Edison; isn't that a fact, Mr. Burke?

A. Yes, I knew they had such intentions.

Q. In fact, Mr. McPhail had written you a letter and told you that, hadn't he?

A. Yes.

Q. And knowing that fact, Mr. Burke, you then wrote this letter of August 10th requesting a conference on Mediation Case No. 6755, didn't you?

A. Yes.

Q. And there hadn't been any conference on that matter for over three and a half years, had there, as such?

A. As such, no; not to my knowledge, anyhow.

[148] Q. Well, your file didn't disclose any, is that true?

A. True.

Q. And you attempted at that time to justify any strike by that mediation case, didn't you?

A. A strike in relation to the failure to consummate an agreement providing for the protective agreement if the terminal were established, yes.

Q. Yes. And that was the purpose for that letter, wasn't it, Mr. Burke?

A. Yes.

MR. CURPHEY: That's all I have of this witness, your Honor.

THE COURT: Redirect?

Testimony of James E. Burke

Mr. LYMAN: Yes, your Honor, just a few questions.

* * * *

[149] REDIRECT EXAMINATION.

By Mr. RICHARD LYMAN:

Q. Mr. Burke, you didn't indulge in any correspondence or telegram communications for the express purpose of setting up your right to have a strike, did you?

A. I don't quite understand your question.

Q. Well, I don't know whether you quite understood Mr. Curphey's last question to you, but the implication in it was that you wrote a letter for that purpose, that by writing the letter you would establish your right to have a strike.

Did you have any such intention in mind when you wrote that letter?

A. No. In my opinion we had the right to strike the minute the Mediation Board terminated its services.

Mr. LYMAN: That is all.

Mr. CURPHEY: That's all.

The COURT: You may stand down, Mr. Burke.

* * * *

Mr. LYMAN: Your Honor, that concludes the defendants' case. I understand all the [150] exhibits have been admitted.

The COURT: They have all been received with the exception of the one, on which I reserved my ruling.

Does the plaintiff desire to offer evidence in rebuttal?

Mr. CURPHEY: No, your Honor.

The COURT: Does the plaintiff rest at this time?

Mr. CURPHEY: Yes, your Honor.

The COURT: What about argument on this matter? I am wondering about this: If it suits the convenience of counsel, it might be more desirable to continue the case over until morning for argument because there is much documentary material the Court ought to go through. I think argument would be more meaningful if I had the opportunity to do that.

Mr. LYMAN: I agree.

Testimony of James E. Burke

Mr. CURPHEY: I agree with that.

The COURT: Then we will recess until nine o'clock tomorrow morning.

* * * * *

PLAINTIFF'S TRIAL EXHIBITS *

Letter, General Chairmen to McPhail, 4/28/61 (Pl. Ex. 1)

Toledo, Ohio
April 28, 1961

Mr. C. J. McPhail, Asst. General Manager
Detroit and Toledo Shore Line Railroad
4820 Schwartz Road
Toledo 11, Ohio

Dear Sir:

We the undersigned herewith serve formal Section Six Notice under the provisions of our respective agreements and the Railway Labor Act to negotiate an agreement to cover working conditions for the employees represented by our respective organizations in order to cover conditions involved by contemplated changes of working conditions in setting up tie up point.

Yours truly

/s/ WARREN F. ROSCOE
Vice Chairman
General Chairman ORC&B

/s/ D. K. BILGER
General Chairman BRT

/s/ E. F. GENSLER
General Chairman BLF&E

cc: W. P. Kennedy, Pres., BRT
J. A. Paddock, Pres., ORC&B
H. E. Gilbert, Pres., BLF&E
F. A. Collin, Vice Pres., BRT

* Received in evidence, p. 68, *supra*.

Plaintiff's Trial Exhibits

Letter, General Chairmen to McPhail, 6/8/61 (Pl. Ex. 2)

Toledo, Ohio
June 8, 1961.

Mr. C. J. McPhail
Assistant General Manager
Detroit & Toledo Shore Line R.R. Company
4820 Schwartz Road
Toledo 11, Ohio

Dear Sir:

Enclosed will be found our written proposal referred to in your letter of May 29, 1961 affirming the recess requested in conference of May 23rd when handling our Section 6 Notice dated April 28, 1961.

In furtherance of negotiations covering contemplated change of terminal for Trains 401-402 and 407-408 from Lang to Edison, we will be available to meet with you at an early date if you will suggest same.

Kindly acknowledge receipt.

Yours truly,

/s/ W. R. SUZOR
General Chairman ORC&B

/s/ D. K. BILGER
General Chairman BRT

/s/ E. F. GENSLER
General Chairman BLF&E

*Plaintiff's Trial Exhibits***Written Proposal, 6/8/61 (Pl. Ex. 3)**

WHEREAS the parties hereto desire to change the present Home Terminal of Trains 401-402 and 407-408 from Lang and operate them out of Edison; it is hereby agreed that:

Section 1:

(a) Trains 401-402 and 407-408 will operate daily to perform industrial switching at points between Rockwood and Trenton.

(b) Whenever required to perform services other than exclusive industrial switching these employees will be paid a minimum day for each additional kind or type of service without deduction from any other earnings of their trip or tour of duty.

(c) Through and irregular freight, work, wreck, construction and circus trains will not be required to handle or make set-off or pick-up of cars at any point between Rockwood and Trenton or either named station. If required to do so they will be paid an additional minimum day without deduction from any other earnings of their trip or tour of duty.

(d) Train service employees will not be required to move or spot engines for fuel, sand, water, or exchange for another engine. Neither will they be required to place supplies of any kind on engines; lock up or unlock engine cabs or shut down or start up or watch same; or do any cleaning of any kind of engines or rest quarters. If required to perform any of these services they will be paid not less than a minimum day in addition to and without deduction from any other earnings of their trip or tour of duty.

(e) Each train crew shall consist of not less than one (1) Engineer; one (1) Fireman; one (1) Conductor; and two (2) Trainmen-Helpers, and these assignments will not be changed, abolished, or substituted by other titles, or the number increased or reduced except by mutual consent of the parties signatory hereto.

(f) Adequate quarters and facilities for the employees to obtain rest, food, storage lockers, etc., will be made available by the company in Edison Station Office Building.

Plaintiff's Trial Exhibits

(g) Hostlers shall be employed at Edison on any shift where the servicing of engines is necessary and required.

Section 2:

(a) When no bids are received for any regular assignment established at Edison the position will be filled from the extra board maintained at Lang under the same conditions pertaining to filling of other vacancies at outside points.

(b) An employee not bidding for a regular position established at Edison shall not be compelled to take it and will not lose his rights to other positions or assignments for which he may otherwise be qualified.

(c) No new employees will be hired, or extra boards established at Edison without agreement having first been reached between the affected parties, and consented to by the parties signatory hereto.

(d) Employees from Lang used to fill vacancies or assignments at Edison will be paid deadhead mileage and reimbursed for automobile transportation costs at the mileage rate allowed by the company to its officials and employees.

Section 3:

(a) Employees who accept regular assignments when established at Edison and desire to move their place of residence to within ten (10) miles of this point, will be assured by the company against any loss resulting from lease terminations, sale of their homes, etc., provided,

1. The employee accepting a regular assignment notifies the company within six-(6)-months thereafter that he intends to move from his current location at the time to this new location and does so move.
2. If the employee cannot make a satisfactory disposition of his lease, or sale of his property, it will be appraised for its value by an appraiser agreed upon by the employee and the company, whose services will be paid for by the company. If the property is sold or disposed of for the amount of such appraised value or more, the company liability in this connection will

Plaintiff's Trial Exhibits

have been made. If not sold or disposed of for the appraised value, the company shall have the option to purchase such property from the employee at the appraised value, or the company may reimburse the employee for the difference between such appraised value of his property and the amount the property is sold for, but no such sales will be made until the company shall have had the option limited to thirty (30) days to exercise same.

(b) Employees who move within ten (10) miles of Edison will be given reasonable assistance by the company in locating new homes or places of residence in this area and the company will defray the cost of moving their household goods in an amount not to exceed \$200.00.

(c) Provisions of existing agreements not in direct conflict herewith will continue in full force and effect until changed, revised, cancelled or amended in pursuance of the terms of such agreements.

(d) This agreement shall continue in effect until changed, amended or cancelled in accordance with provisions of the Railway Labor Act as amended.

For the Order of Conductors and Brakemen

/s/ W. R. SUZOR
General Chairman

For the Brotherhood of Railroad Trainmen

/s/ D. K. BILGER
General Chairman

For the Brotherhood of Locomotive Firemen and Enginemen

/s/ E. F. GENSLER
General Chairman

For the Detroit and Toledo Shore Line Railroad Company

Assistant General Manager

Committee Proposition No. 1

Submitted—June 8, 1961

Plaintiff's Trial Exhibits

**Letter, NMB to McPhail, Gilbert and Luna,
4/3/63 (Pl. Ex. 4)**

NATIONAL MEDIATION BOARD
Washington

April 3, 1963
Case No. A-6755.

Mr. C. J. McPhail
Assistant General Manager
The Detroit & Toledo Shore Line RR Co.
4820 Schwartz Road
Toledo, Ohio

Mr. H. E. Gilbert, President
Brotherhood of Locomotive Firemen & Enginemen
318 Keith Building
Cleveland 15, Ohio

Mr. Charles Luna, President
Brotherhood of Railroad Trainmen
Standard Building
Cleveland 13, Ohio

Gentlemen:

Reference is made to dispute between your respective carrier and organizations, in which mediation services of the Board was invoked by the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen, described as follows:

Request of organization to negotiate an agreement to cover working conditions for employees to cover conditions involved by contemplated change in setting up tie-up point."

For your information, the file in this case was closed on April 3, 1963 account of the employees' and carrier's refusal to arbitrate.

Very truly yours,

[Signed]
E. C. THOMPSON
Executive Secretary

*Plaintiff's Trial Exhibits***Special Board Award, 11/30/65 (Pl. Ex. 5)**

SPECIAL BOARD OF ADJUSTMENT No. 375

Award No. 21

Case No. 21

Parties To Dispute:

The Brotherhood of Locomotive Firemen and Enginemen
The Detroit and Toledo Shore Line Railroad Company

Statement of Claim:

"Formal protest of Bulletin No. 1192, dated September 24, 1963, wherein the Carrier advertises a Work Train to operate out of Dearoad, contrary to agreement and all practices of the past.

"In connection therewith, also accept this as a Committee claim on behalf of all enginemen for any loss sustained thereunder, should the aforementioned bulletin be placed in effect."

Findings:

What took place here was not a change in the recognized terminal, but simply amounted to an outlying assignment. There is nothing in the rules of agreement which precludes this carrier from establishing an outside assignment.

The employees laid particular stress on their Exhibit 8, but close examination of same does not indicate to the majority that the Carrier limited itself with respect to establishing outside assignments. Said Exhibit 8 reflects that a limited agreement between the parties to set-up a five-day assignment at a date prior to the five-day work week was effectuated.

Award:

The claim is denied.

/s/ DAVID R. DOUGLASS, *Neutral Member*

/s/ C. J. MCPHAIL,
Carrier Member

/s/ D. C. DEERING,
Employee Member
(I dissent)

Detroit, Michigan—November 30, 1965

*Plaintiff's Trial Exhibits***Bulletin, 9/19/66 (Pl. Ex. 15)**

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY
Bulletin # 1536

Enginemen
Hostlers
Conductors
Trainman
Foreman
Helpers

Lang, Ohio
September 19, 1966.

Effective Monday, September 26, 1966 Trains 801-802 will be established to operate out of Edison on a Daily Basis.

Train and engine crew to report for duty at 8.00 Am.

Train will operate to perform industry and station switching between Dearoad and Greenings.

Home Terminal is designated as Edison.

Bids account this establishment will be received until 10.00 Am Sunday September 25, 1966.

Assignment will be effective at 12.01 Am September 26, 1966.

Road and Yard Book

Hostlers

Dearoad

Mr R A Altmeier

Mr D G Vane

Mr L Sabo

Mr A Zimmerman

Mr F Bette

Mr Chas L Border

Mr R D Curry

Mr H D Hulquist

Mr E F Gensler Actg Gen'l Chairman 2

Mr J Wulf Gen'l Chairman

Mr W Upham Gen'l Chairman

CC Dispatchers

CC Yardmasters

CHAS L BORDER

Terminal Trainmaster

C R C

*Plaintiff's Trial Exhibits***Letter, Rancich to McPhail, 1/27/66 (Pl. Ex. 16)****BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN**

January 27, 1966

Mr. C. J. McPhail, General Manager
Detroit & Toledo Shore Line RR.
131 West Lafayette Ave
Detroit, Michigan 48226

Dear Sir:

Pursuant to the provisions of Section 6 of the Railway Labor Act, as amended, and our currently effective Article 41 of the schedule, request is herewith made to open our agreement to the extent as follows,

Article 3—Paragraph A reading. . . .

“Through freight runs between Lang and Dearoad, Lang and West Detroit or other points within the Detroit Terminal District will be turnaround runs, with Lang as the home terminal.”

to be changed as follows. . . .

All road service runs and/or assignments will originate and terminate at Lang yard (Toledo, Ohio) for enginemen. Lang yard is understood to mean the present switching limits.

Kindly acknowledge receipt hereof within ten days setting date, time, and place for conference.

Yours Truly,

/s/ F. L. RANCICH

General Chairman B.L.F.&E.

cc H. E. Gilbert

Plaintiff's Trial Exhibits

Letter, NMB to McPhail and Gilbert, 6/28/66 (Pl. Ex. 17)

NATIONAL MEDIATION BOARD
Washington, D.C. 20572

June 28, 1966
Case No. A-7839.

Mr. C. J. McPhail, General Manager
The Detroit & Toledo Shore Line Railroad Company
131 West Lafayette Avenue
Detroit, Michigan 48226

Mr. H. E. Gilbert, President
Brotherhood of Locomotive Firemen & Enginemen
15401 Detroit Avenue
Cleveland, Ohio 44107

Gentlemen:

Reference is made to application for the mediation services of this Board, in a dispute between your respective carrier and organization, described as follows:

"Section 6 notice of January 27, 1966 requesting revision of Article 3 of the current schedule agreement."

Attached for Mr. Gilbert's information is a copy of a letter addressed to the Board dated June 24, 1966 from Mr. C. J. McPhail.

This application has been docketed as our Case No. A-7839 and will hereafter be referred to by that number. A mediator will be assigned to mediate this dispute consistent with prior commitments.

Very truly yours,

[Signed]
THOMAS A. TRACY
Executive Secretary

*Plaintiff's Trial Exhibits***Letter, Deering to McPhail, 9/10/65 (Pl. Ex. 18)****BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN****DEL C. DEERING****Vice President**

September 10, 1965

Mr. C J McPhail**General Manager, D.&T.S.L. Ry.****131 West Lafayette Ave.****Detroit, Michigan****Re: NMB Case A-6755, BLF&E****Section 6 Notice of April 28, 1961****Dear Mr. McPhail:**

As you know efforts were made recently, the last date being September 9, to settle this entire matter by negotiating an agreement to start and tie-up a local freight run at Edison (Trenton), Michigan, but without prejudice to either party's right to the contrary. However, we could not get together and accordingly I advised you that we were closing the file on this case, and would also notify the NMB to that effect; but this action on our part was with the understanding that Case No. 21 now in SBA will in all probability settle the issue of starting and tying up a crew at other than Lang Yard.

In view of the above, Case A-6755 (Our Section 6 Notice of April 28, 1961) is considered closed with the distinct understanding it is without prejudice to the position of the employees and can not be used against the employees in any other case for reference purposes involving terminal changes.

The above for your information, I am

Your very truly,

/s/ D. C. DEERING

cc: F. Rancich, GC

DEFENDANTS' TRIAL EXHIBITS ***Letter, McPhail to Rancich, 2/4/66 (Def. Ex. B)**

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY
131 West Lafayette Avenue
Detroit, Michigan 48226

C. J. McPHAIL
General Manager

February 4, 1966
File: TC 75

Mr. F. L. Rancich, General Chairman
Brotherhood of Locomotive Firemen & Enginemen
2022 Brussels Street
Toledo, Ohio—43613

Dear Sir:

This will acknowledge receipt of your Section 6 notice dated January 27, 1966, to modify current schedule rules, specifically Article 3 (a) to read:

“All road service runs and/or assignments will originate and terminate at Lang Yard (Toledo, Ohio) for enginemen. Lang Yard is understood to mean the present switching limits.”

By mutual agreement initial meeting on this Section 6 notice was held at 10:00 A.M. on February 2, 1966. Discussion did not result in any solution acceptable to both parties. It was the Carrier's position that such a rule would be too restrictive in our operations and the requested change was not acceptable.

You were also informed at this meeting that the Carrier reserves the right to serve Section 6 notices of its own to be handled concurrently with your Section 6 notice of Janu-

* Received in evidence, p. 82, *supra*.

Defendants' Trial Exhibits

ary 27, 1966, and you stated it was your position that any Carrier Section 6 notice must be handled separately and apart from the organization's notice.

Yours truly,

/s/ C. J. McP^HAIL

General Manager

*Defendants' Trial Exhibits***Letter, Rancich to McPhail, 2/5/66 (Def. Ex. C)****BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN**

February 5, 1966

Mr. C. J. McPhail, General Manager
Detroit & Toledo Shore Line RR.
131 West Lafayette Ave.
Detroit, Michigan 48226

Dear Sir:

This will acknowledge yours of February 4, 1966 relating to our Section 6 notice dated January 27, 1966.

This is to advise, in the conference on this Section 6 notice held February 2, 1966 it was the carriers position that the change is unacceptable, therefore, conferences on this notice are terminated.

Additionally, the Railway Labor Act specifically sets forth the procedure for effecting a change in the rates of pay, rules and working conditions, and in this connection, we once again advise that any carrier Section 6 notice will be handled separately and apart from the organization notice.

Kindly acknowledge receipt.

Yours truly,

/s/ F. L. RANCICH
General Chairman BLF&E

cc H. E. Gilbert Pres-BLF&E

*Defendants' Trial Exhibits***Letter, McPhail to Rancich, 2/14/66 (Def. Ex. E)**

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY
131 West Lafayette Avenue
Detroit, Michigan 48226

C. J. McPHAIL
General Manager

February 14, 1966
File: TC-75

Mr. F. L. Rancich, General Chairman
Brotherhood of Locomotive Firemen & Enginemen
2022 Brussels Street
Toledo, Ohio—43613

Dear Sir:

This will acknowledge receipt of your letter dated February 5, 1966, having reference to your Section 6 notice dated January 27, 1966, to modify current schedule rules to provide, in part:

"All road service runs and/or assignments will originate and terminate at Lang Yard (Toledo, Ohio) for enginemen. Lang Yard is understood to mean the present switching limits."

You state in the second paragraph of your letter that following initial conference on February 2, 1966, you consider conferences on this notice as terminated.

We did not have an opportunity in the initial conference to express fully our position with regard to this notice. Your notification of conference termination is accepted with the understanding that it is the Carrier's position that the said notice is non-bargainable, and the rule requested is outside the ambit of the Railway Labor Act. It is an attempt to take away managerial rights which the Carrier feels are inherent to it, and which are not subject to negotiation.

Under the Railway Labor Act the Carrier has a mandate to provide public transportation in the most economical and

Defendants' Trial Exhibits

efficient maner, and must maintain certain rights which are not subject to negotiation in order to provide that it may so operate. Your Section 6 notice of January 27, 1966, as cited above, attempts to interfere with these rights by placing an undue restriction upon the managerial functions, and on this basis must be rejected.

Yours truly,

Original Signed

C. J. McPHAIL
General Manager

*Defendants' Trial Exhibits***Bulletin, 5/26/66 (Def. Ex. F)****THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY****Bulletin # 1510****Lang, Ohio
May 26, 1966****Enginemen
Hostlers
Conductors
Trainman
Foreman
Helpers**

Effective Thursday, June 2, 1966, the following Local Train will be established to operate out of Edison.

Train, 801 on duty 6.00 Am, to work daily except Sunday.

Effective Wednesday, June 1, 1966, the following Local Train will be established to operate out of Edison

Train, 803, on duty 5.00 Pm, to work daily except Sunday.

These trains will normally operate to perform Local service between Greenings and Dearoad.

Road switcher rate will be applicable for Trainman on these assignments.

Bids account establishment of these trains will be received until 10.00 Am, Tuesday, May 31, 1966.

Assignment will be effective at 12.01 Am, Wednesday June 1, 1966.

Yard & Road Book**Hostlers****Dearoad****Mr R A Altmeier****Mr L Sabo****Mr A Zimmerman****Mr F Bette****Mr Chas L Border****Mr R D Curry****Mr F Rancich Gen'l Chairman 2**

Defendants' Trial Exhibits

Mr J Wulf Gen'l Chairman
 Mr W Upham Gen'l Chairman
 CC Dispatchers
 CC Yardmasters

CHAS L BORDER
Terminal Trainmaster
 C R C

Defendants' Trial Exhibits

Telegram, Gilbert to NMB, 5/27/66 (Def. Ex. G)

[Caption of Western Union Form Omitted.]

May 27, 1966

T A Tracy
National Mediation Board
Washington, D C

Services of NMB requested in BLF&E dispute Detroit & Toledo Shore Line RR re assignment of two jobs to start at Edison Yard formerly identified as NMB Case A-6755. Section 6 Notice dated January 27, 1966 has been served and carrier proposes to institute changes 6:00 PM, June 1. Formal application for services of NMB will follow via U S Mail. Request carrier's attention be directed to status quo provisions of RLA. Please advise.

H E GILBERT

HLE:1p 4:35 PM

cc J W Jennings E F Gensler

Defendants' Trial Exhibits

Letter, McPhail to General Chairmen, 6/10/66 (Def. Ex. H)

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY
131 West Lafayette Avenue
Detroit, Michigan 48226

C. J. McPHAIL
General Manager

June 10, 1966
File: 59.9

Mr. John Wulf, Acting General Chairman
Order of Railway Conductors & Brakemen
2025 West Territorial Road
Battle Creek, Michigan

Mr. Wm. Upham, General Chairman
Brotherhood of Railroad Trainmen
2528 Luddington Drive
Toledo, Ohio—43615

Mr. F. L. Rancich, General Chairman
Brotherhood of Locomotive Firemen & Enginemen
2022 Brussels Street
Toledo, Ohio—43613

Gentlemen:

Recently this Carrier was requested by the Monsanto Chemical Company to prepare to resume switching service of that plant at Trenton effective June 1, 1966.

On the basis of this request, it was determined that the Carrier would need to operate two additional road assignments in order to handle the industrial switching at this point. Consequently, bulletins were issued establishing two new assignments to originate and terminate at Trenton, Michigan, with Trenton being the home terminal for such crews at an outlying terminal.

However, prior to June 1, 1966, the Carrier was notified that the plans were changed and it would not be necessary to commence switching the Monsanto Chemical Company on that date. As a result of the change in plans, the bulletins were cancelled and the establishment of the assignments was withdrawn due to there being no longer a necessity for such assignments.

Defendants' Trial Exhibits

This letter, therefore, is simply of an informative nature to advise the assignments were cancelled only because the request for service by Monsanto was likewise cancelled.

As you know, however, we are, by agreement, scheduled to resume switching at Monsanto on October 1, 1966, and under the provisions of the agreements in effect, we contemplate the establishment of assignments to originate and terminate at Trenton on that date, with welfare and bunk-room facilities to be constructed to accommodate employees who will go on duty and tie-up at that point.

Yours truly,

Original Signed
C. J. McP^HAIL
General Manager

*Defendants' Trial Exhibits***Letter, NMB to Gilbert, 6/1/66 (Def. Ex. I)**

NATIONAL MEDIATION BOARD
Washington, D.C. 20572

June 1, 1966

Mr. H. E. Gilbert, President
Brotherhood of Locomotive Firemen
and Enginemen
15401 Detroit Avenue
Cleveland, Ohio 44107

Dear Mr. Gilbert:

Reference is made to the telegraphic application received from the Brotherhood of Locomotive Firemen and Enginemen for the mediation services of this Board in a dispute involving Detroit and Toledo Shore Line Railroad Co., on the subject of Section 6 notice dated January 27, 1966.

I am attaching hereto copy of a telegram received in this office June 1, 1966, from Mr. C. J. McPhail, General Manager, of the Detroit and Toledo Shore Line Railroad Co., in regard to this application.

In your wire of May 31, 1966, you referred to NMB Case A-6755. Our records indicate that this case was closed April 3, 1963, on the basis of refusal to arbitrate by both parties.

Defendants' Trial Exhibits

Further action on this matter will be deferred pending receipt of the formal application from your office.

Very truly yours,

[Signed]

THOMAS A. TRACY

Executive Secretary

cc: Mr. C. J. McPhail, General Manager
Detroit and Toledo Shore Line Railroad Co.
131 West Lafayette Avenue
Detroit, Michigan

Defendants' Trial Exhibits

Telegram, McPhail to NMB, 6/1/66 (Def. Ex. J)

RDA005 856A EDT JUN 1 66 NHCO20 SPOC 143
TQLDEA319 DE LLQ250 PD 2 EXTRA DETROIT MICH 31 728P
EST T A TRACY, EXECUTIVE SECRETARY, NATIONAL MEDIA-
TION BOARD WASH DC

RETEL MAY 31 REQUEST FOR BOARD SERVICE DISPUTE WITH
D AND TSL RAILROAD AND BLFE REFERENCE ASSIGNMENT
TWO JOBS AT EDISON. CARRIER NOT ESTABLISHING JOBS
JUNE FIRST. SECTION SIX NOTICE OF BLFE JANUARY 27 1966
CONFERENCES TERMINATED BUT CARRIER HAS RIGHTS
UNDER AGREEMENT TO ESTABLISH JOBS INVOLVED THERE-
FORE STATUS QUO PROVISION NOT RESTRICTIVE TO SUCH
CARRIER ACTION

C J MCPHAIL GENERAL MANAGER D & TSL RAILROAD

(48).

*Defendants' Trial Exhibits***Letter, Gilbert to NMB, 6/17/66 (Def. Ex. L)**

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS
Cleveland, Ohio

H. E. GILBERT
President

June 17, 1966

Mr. Thomas A. Tracy
Executive Secretary
National Mediation Board
Washington, D. C. 20572

Dear Mr. Tracy:

Attached as indicated by telegram dated May 27, are NMB Forms—2 requesting the services of the National Mediation Board under Section 5 First of the Railway Labor Act in a dispute between the BLF&E and management of the Detroit & Toledo Shore Line Railroad described in brief as follows:

“Section 6 Notice of January 27, 1966, requesting revision of Article 3 of the current schedule agreement.”

Parties have met in numerous conferences without resolving the issues and it is respectfully requested that NMB promptly docket the above-described controversy and assign a mediator to handle.

This will also acknowledge receipt of your June 1 letter and attachment in connection with the above-described matter.

Please advise.

Very truly yours,

/s/ H. E. GILBERT

Attachment

cc: J. W. Jennings, VP, BLF&E
E. F. Gensler, AGC—D&TSL, BLF&E

Defendants' Trial Exhibits

Letter, Tracy to McPhail and Gilbert, 6/28/66 (Def. Ex. M)

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

June 28, 1966
Case No. A-7839

Mr. C. J. McPhail, General Manager
The Detroit & Toledo Shore Line Railroad Company
131 West Lafayette Avenue
Detroit, Michigan 48226

Mr. H. E. Gilbert, President
Brotherhood of Locomotive Firemen & Enginemen
15401 Detroit Avenue
Cleveland, Ohio 44107

Gentlemen:

Reference is made to application for the mediation services of this Board, in a dispute between your respective carrier and organization, described as follows:

"Section 6 notice of January 27, 1966 requesting revision of Article 3 of the current schedule agreement."

Attached for Mr. Gilbert's information is a copy of a letter addressed to the Board dated June 24, 1966 from Mr. C. J. McPhail.

This application has been docketed as our Case No. A-7839 and will hereafter be referred to by that number. A mediator will be assigned to mediate this dispute consistent with prior commitments.

Very truly yours,

[Signed]

THOMAS A. TRACY
Executive Secretary

Defendants' Trial Exhibits

Telegram, Gilbert to Tracy, 9/23/66 (Def. Ex. N)

[Caption of Western Union Form omitted.]

September 23, 1966

Mr T A Tracy, Secretary
National Mediation Board
Washington, DC

Re my telegram September 20 NMB Case A-6755 Detroit & Toledo Shore Line Ry. Reference should have been made to Case A-7839 docketed by NMB June 28, 1966. Request mediator be assigned promptly to Case A-7839. Please advise.

H. E. GILBERT

HLE:lp 3:30 PM

CC E F Gensler

Defendants' Trial Exhibits

Letter, Tracy to Gilbert, 9/26/66 (Def. Ex. O)

NATIONAL MEDIATION BOARD
Washington

September 26, 1966

Mr. H. E. Gilbert, President
Brotherhood of Locomotive Firemen and Enginemen
15401 Detroit Avenue
Cleveland, Ohio 44107

Dear Mr. Gilbert:

This will acknowledge your telegram of September 26th, as well as your letter of September 23, 1966, which referred to NMB Case A-7839.

Your request that a mediator be assigned to this case promptly has been noted and we will endeavor to comply with your request as soon as possible.

Very truly yours,

[Signed]

THOMAS A. TRACY

Executive Secretary

cc: Mr. C. J. McPhail, General Manager
The Detroit & Toledo Shore Line RR Co.

Defendants' Trial Exhibits

Letter, Cool to General Chairmen, 2/21/61 (Def. Ex. AA)

Lang, Ohio
February 21, 1961

Mr. W. Suzor,
Gen'l. Chairman, ORC

Mr. E. F. Gensler,
Gen'l. Chairman, BLF&E

Mr. D. K. Bilger,
Gen'l. Chairman, BRT

Gentlemen :

In view of the drastic drop in revenue it is necessary that our operating expenditures be reduced. As a step in that direction it is our intention to discontinue operation of trains 401-402 and 407-408 out of Lang and operate them out of Edison.

The purpose of this letter is to inquire as to the minimum requirements regarding facilities for your members going on duty and relieving at this station.

Please acknowledge this letter.

Yours truly,

/s/ B. T. COOL
Superintendent

BTC :ol

cc—Mr. C. J. McPhail

Defendants' Trial Exhibits

**Letter, McPhail to General Chairmen,
5/29/61 (Def. Ex. DD)**

May 29, 1961
File 522.33

Mr. W. Suzor
Gen'l. Chairman, O.R.C.
Box 13
Samaria, Michigan

Mr. D. K. Bilger
Gen'l. Chairman, B.R.T.
5229 Hammond Dr.
Toledo 11, Ohio

Mr. E. F. Gensler
Gen'l. Chairman, B.L.F.E.
3713 Upton Avenue
Toledo 12, Ohio

Gentlemen:

Referring to joint conference held on May 23, 1961 in connection with Section 6 Notice dated April 28, 1961 served on the carrier by each of you as representatives of your respective organizations for the purpose of negotiating an agreement to cover working conditions involved by contemplated change in tie up point.

This will confirm carrier's affirmative reply to your request for recess of conference to permit preparation of written proposal to cover contemplated change, with the understanding carrier will not progress plans, for the present, pending receipt of such proposal.

Yours truly,

/s/ C. J. McPhail

CJM/mb

Defendants' Trial Exhibits

**Letter, McPhail to General Chairmen,
6/14/61 (Def. Ex. GG)**

June 14, 1961
522.33

Mr. W. Suzor
Gen'l. Chairman, O.R.C.
Box 13
Samaria, Michigan

Mr. D. K. Bilger
Gen'l. Chairman, B.R.T.
5229 Hammond Dr.
Toledo 11, Ohio

Mr. E. F. Gensler
Gen'l. Chairman, B.L.F.E.
3713 Upton Avenue
Toledo 12, Ohio

Gentlemen :

This will acknowledge receipt of your proposal attached to your letter of June 8, 1961 to cover the contemplated change of terminal for Trains 401-02 and 407-08, requested in your Section 6 Notice of April 28, 1961.

It is the opinion of the Carrier that the proposal as presented is far beyond even a reasonable approach to an acceptable agreement.

Because of the apparent lack of a common ground for further negotiation, this is to advise your joint proposal is not acceptable.

Yours truly,

/s/ C. J. McPhail

CJM/mb

Defendants' Trial Exhibits

**Letter, McPhail to General Chairmen,
6/5/62 (Def. Ex. HH)**

**THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY
Office of Assistant General Manager
4820 Schwartz Road**

**C. J. McPhail
Assistant General Manager**

June 5, 1962
Toledo 11, Ohio
522.33

Mr. W. Suzor
General Chairman, O.R.C.
Box 13
Samaria, Michigan

Mr. D. K. Bilger
General Chairman, B.R.T.
5229 Hammond Drive
Toledo 11, Ohio

Mr. E. F. Gensler
General Chairman, B.L.F.&E.
3713 Upton Avenue
Toledo 12, Ohio

Gentlemen:

Referring to the initial and subsequent conferences held in connection with your joint Section 6 Notice dated April 28, 1961, requesting agreement to cover anticipated changes in working conditions for employees represented by your respective organizations brought about by our contemplated establishment of an out-lying terminal or tie-up point.

As indicated to you in letter dated June 14, 1961, your joint proposal was not acceptable. Subsequent negotiations on May 18, 1962 did not produce any further mutual understanding of the Carrier's intention to establish an out-lying terminal.

Defendants' Trial Exhibits

Without prejudice to the position of the Carrier that there is nothing in the agreement prohibiting or restricting establishment of home terminals for local or road switcher service at points other than Lang, there appears to be no ground on which to further negotiate your Section 6 Notice and accordingly, therefore, please consider negotiation terminated.

Yours truly,

/s/ C. J. McPHAIL

CJM/mb

Defendants' Trial Exhibits

Letter, McPhail to NMB, 2/8/63 (Def. Ex. PP)

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY
Office of Assistant General Manager
4820 Schwartz Road

C. J. McPHAIL
Assistant General Manager

February 8, 1963
Toledo 11, Ohio

Dear Mr. Thompson:

Referring to your letter of January 29, 1963, concerning Case No. A-6755, covering dispute between this carrier, the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen & Enginemen as follows:

"Request of organization to negotiate an agreement to cover working conditions for employees to cover conditions involved by contemplated change in setting up tie-up point."

Your attention is invited to the notice quoted above as referring to a "contemplated change in setting up tie-up point." This carrier is no longer contemplating a change in setting up a tie-up point that was used as the basis of the organizations' Section 6 Notice. The problem, therefore, is moot; and accordingly arbitration, insofar as this carrier is concerned, is also moot.

We are not agreeable to submitting the controversy to arbitration.

Yours truly,

/s/ C. J. McPHAIL

CJM/mb

MR. E. C. THOMPSON
Executive Secretary
National Mediation Board
7th Floor—National Rifle Assn. Bldg.
1230 16th St., N.W.
Washington 25, D.C.

Defendants' Trial Exhibits

**Letter, NMB to McPhail, Gilbert and Luna,
3/4/63 (Def. Ex. RR)**

NATIONAL MEDIATION BOARD
Washington

March 4, 1963
Case No. A-6755

Mr. C. J. McPhail
Assistant General Manager
The Detroit & Toledo Shore Line RR Co.
4820 Schwartz Road
Toledo, Ohio

Mr. H. E. Gilbert, President
Brotherhood of Locomotive Firemen & Enginemen
318 Keith Building
Cleveland 15, Ohio

Mr. Charles Luna, President
Brotherhood of Railroad Trainmen
Standard Building
Cleveland 13, Ohio

Gentlemen :

We have been advised by Mr. C. Luna, President of BRT, Mr. H. E. Gilbert, President of BLF&E, and Mr. C. J. McPhail, Assistant General Manager of the carrier, in answer to our letter addressed jointly to your respective carrier and organizations, under date of January 29, 1963, that the carrier and organizations have declined, in writing, to arbitrate the questions in our Case No. A-6755.

Your attention is therefore directed to the last clause in Section 5, First (b) of the Railway Labor Act, as amended, reading as follows:

“If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no

Defendants' Trial Exhibits

change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

It is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement.

In these circumstances, notice is hereby served in behalf of the Board that its services (except as provided in Section 5, Third, and in Section 10 of the law) have this day been terminated under the provisions of the Railway Labor Act.

We are sending to Messrs. Gilbert and Luna a copy of Mr. McPhail's letter dated February 8, 1963, to Messrs. McPhail and Luna a copy of Mr. Gilbert's letter dated February 21, 1963, and to Messrs. McPhail and Gilbert a copy of Mr. Luna's letter dated February 11, 1963.

By order of the National Mediation Board.

Very truly yours,

[Signed]

E. C. THOMPSON

Executive Secretary

Defendants' Trial Exhibits

**Letter, McPhail to General Chairmen,
1/24/66 (Def. Ex. VV)**

**THE DETRIOT AND TOLEDO SHORE LINE RAILROAD COMPANY
131 West Lafayette Avenue
Detroit, Michigan 48226**

**C. J. McPhail
General Manager**

**January 24, 1966
File: 00028**

**Mr. F. L. Rancich, General Chairman
Brotherhood of Locomotive Firemen & Enginemen
2022 Brussels Street
Toledo, Ohio 43613**

**Mr. Wm. Upham, General Chairman
Brotherhood of Railroad Trainmen
2523 Luddington Drive
Toledo, Ohio 43615**

**Mr. John Wulf, General Chairman
Order of Railway Conductors & Brakemen
2025 West Territorial Road
Battle Creek, Michigan**

Gentlemen:

You may recall, a few years' ago each of your respective organizations were requested to participate in an inspection of facilities at our Trenton Freight Office in an effort to reach an understanding as to the welfare facilities necessary for the establishment of Trenton, Michigan as an outlying terminal for road crews. As a result of the serving of Section Six Notices under the Railway Labor Act, subsequent negotiations were conducted and terminated by the National Mediation Board because of failure of the parties to agree and because the carrier indicated to the Board it did not desire at that time to establish an outlying assignment at Trenton.

Instead, however, the carrier did establish outlying assignment at Dearoad, including a work train in September

Defendants' Trial Exhibits

1963, which subsequently became the basis of formal protest by the BofLF&E, progressed to Special Board of Adjustment No. 375, whereupon the Board issued its Award No. 21 in Case No. 21, dated November 30, 1965, stating: "There is nothing in the rules of agreement which precludes this carrier from establishing an outside assignment."

Accordingly, therefore, it is our intention to construct welfare facilities at our Trenton Freight Office to accommodate train and engine crews at that location. However, before doing so, it is felt that all of the parties should be in agreement, if possible, as to the accommodations necessary and you are, therefore, invited to participate in such inspection at the Trenton Station at 10 A.M., Thursday, February 3, 1966.

Yours truly,

/s/ C. J. McPhail

DECISION OF DISTRICT COURT
(October 7, 1966)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. C 66-207

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,
a corporation, *Plaintiff*,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
et al., etc., *Defendants*.

DECISION OF THE COURT

[Transcript, October 7, 1966.]

[2] Young, J.

Gentlemen, I have been considering this matter, the arguments of counsel as well as the various authorities that have been cited, and those citations I have explored for myself. The Court has come to some conclusions which I think should be dispositive of the matter.

Actually, we have two separate cases here before us. This was pointed out in argument and is emphasized by the fact that there are two separate Answers filed. One of the Answers has with it a Counterclaim or Cross-Petition.

So that I am going to consider my disposition of the case as involving two separate matters which will require separate disposition.

The first of the two matters is the Complaint with respect to the actions of the Brotherhood of Railroad Trainmen; at least that is the one that I am going to consider first.

[3] The problem there, of course, is raised by the prayer of the Complaint for an Injunction restraining the Brotherhood from an alleged threat to strike over a dispute that was precipitated by a bulletin posted by the plaintiff on

Decision of District Court

September 19th of this year providing that certain work assignments were going to have their terminal at the Edison Yard at Trenton, Michigan.

While there are apparently some differences between these two locations, it is too trivial to give any consideration to.

The problem here is simply another facet, it seems to the Court, of a long-standing dispute that has occurred between the parties, starting way back in 1961, or perhaps even before that.

It is argued that the 1961 matter is all over and done with and that the current dispute is an entirely new one. It is difficult for me to accept that interpretation of the facts that are on the record in this case.

The problem here, as the Court sees it, is that the plaintiff's claimed right to establish terminals wherever it wants to establish them leaves gaps in the agreements between the plaintiff and the defendant Brotherhood, because the agreement actually only sets up rates of pay and [4] working conditions for operations out of one main terminal.

So that we have, in effect, a situation where there is no agreement between the parties which could determine the difficulties between them.

When we come to consider that dispute in the light of the applicable law, we run into the difficulty that on such matters—that is, matters where there is no agreement between the parties and an agreement has to be negotiated—the Norris-LaGuardia Act and the Railway Labor Act do not seem to contemplate that the Court only has jurisdiction to interfere with other procedures used to resolve those difficulties.

Sometimes the language is used “major disputes and minor disputes,” and while the Court may intervene in minor disputes to see that the provisions of the law are carried out, the Court may not intervene when there is a major dispute between the parties. That appears clearly to me to be the situation here, that there is, and for a long time there has been, a major dispute between these parties.

The dispute has flared up and been in abeyance from time to time, depending on the actions that were taken by the

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parties on one side or the other to exacerbate the underlying difficulties, but it never has [5] been resolved in the way disputes are supposed to be resolved by the parties' rights under the law to self-help, and this Court has come to the conclusion that that being the case here, it has no jurisdiction to grant the relief prayed for in the plaintiff's Complaint.

Insofar as the Complaint involves a dispute with the Trainmen, it will be dismissed.

The situation with respect to the Complaint against the Brotherhood of Firemen and Enginemen presents a considerably different situation, a different problem.

I was unable to find from the evidence before me that the Brotherhood of Firemen and Enginemen had made any threat to strike. What they had done, apparently some time ago, in the spring of this year, was to make a so-called Section VI complaint to the National Mediation Board. That was duly docketed and a number was assigned to it; as I recall, it was numbered A7839. That matter is now pending the appointment of a mediator.

Under those circumstances, I don't see how a court could have any jurisdiction to grant relief to the plaintiff on their Complaint for an Injunction.

In the first place, if the processes of [6] the law have not yet been exhausted, there would be considerable doubt of the Court's jurisdiction. In the second place, if there really isn't any threat, then there is nothing for the Court to enjoin.

So that, again, as to the plaintiff's Complaint against the Brotherhood of Firemen and Enginemen, the Court is constrained to the view that the Complaint must be dismissed.

However, that does not dispose of all the issues that are raised in that matter, because the Brotherhood, in addition to its Answer which seeks the dismissal of the Complaint, has filed a Counterclaim seeking positive relief against the railroad on their behalf.

Their contention is that, having commenced proceedings under the Railway Labor Act, the provisions of the Act require that the matter should remain in status quo until all those procedures have been terminated, and for thirty days thereafter neither party has the right: (a) the rail-

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road to change wages or working conditions, or (b) the union to strike.

The railroad's contention, the plaintiff's contention, in response to that is that this particular matter, that of establishing a terminal at Trenton or the [7] Edison Yard, is not a condition of employment in which the law requires that the status quo be maintained.

There doesn't appear to be any case law that precisely covers that situation, certainly not as applying to the facts in this case.

The plaintiff relies upon a statement in the report of the Labor Board about the matter, but that statement, when taken in context, is based on reading language into the statute which does not appear in the words of the statute itself.

So that this Court apparently has got to take a pioneering position and establish a rule; whether it be a precedent or whether it will stand, there is no way of telling.

But it seems to me that when we look at this thing as a whole and examine the history of it, as shown by the evidence in the record, the question of establishing this terminal at Trenton—while it is arguable, and might even be said to be conceded that the plaintiff had a right to establish terminals wherever it wants to—yet again, when we go back to the contract there isn't anything providing for the working conditions and rates of pay and things of that nature at those other [8] terminals.

So the Court has come to the conclusion that if it were to hold that the plaintiff had a right to go ahead and start doing the things that it proposed in its Bulletin of September 19, 1966 to do, that both as a legal and as a practical matter it would be changing the conditions of employment, because some men would have to be working out of that Yard. They would have to get there the best way they could, or they would have to move from where they now live if they didn't want to commute 35 miles or so back and forth. Certainly where a man lives when he goes to work is one of the conditions of his employment, and, it seems to me, a rather major condition of employment.

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So that I feel constrained to grant to the Brotherhood of Firemen and Enginemen the relief that they seek in their Counterclaim, and that is that until the processes which are established by statute for working out the dispute between them and the plaintiff have been completed that there should be no change in the practices and the conditions that for many, many, many years have governed the carrier's operation and the work of the members of the defendant unions under it.

I feel that the Court has no alternative [9] except to grant to the defendants the relief that they are seeking by their Counterclaim.

It appearing that the defendants are the prevailing parties under the disposition I have just expressed, I will require that the defendants draft Findings of Fact and Conclusions of Law which are expressive of the Findings and Conclusions so delivered orally by the Court. They should submit those within ten days to the plaintiff. The plaintiff may then have an additional ten days to offer, if they desire, their version of what they believe are proper Findings of Fact and Conclusions of Law.

Upon receiving the Conclusions of both parties, or if the plaintiff accepts those submitted by the defendants, upon receiving the Conclusions expressed by the defendants, the Court will then enter an Order upon the Findings and Conclusions.

[Certificate of Court Reporter omitted in printing.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Filed November 1, 1966)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. C 66-207

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,
a corporation, *Plaintiff*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
et al., *Defendants*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 52(a), the court hereby enters the following findings of fact and conclusions of law which constitute the grounds for its previously announced decision herein.

FINDINGS OF FACT

1. Plaintiff is a Michigan corporation with its principal office in Detroit, Michigan, and is a common carrier by railroad engaging in interstate commerce. Plaintiff operates its trains over its line of railroad between Lang Yard in Toledo, Ohio, and Detroit, Michigan, and over the lines of other railroads to other points in the State of Michigan.

2. Defendant Brotherhood of Locomotive Firemen and Enginemen (sometimes hereinafter referred to as the "Firemen") is a voluntary unincorporated association and labor organization, and is the only authorized representative, for purposes of collective bargaining under the Railway Labor Act, of the crafts or classes of railway engineers, firemen and hostlers employed by plaintiff; defendant H. E. Gilbert is President of the Firemen; and defendant E. P. Gensler is General Chairman of the Firemen on the property of plaintiff railroad.

3. Defendant Brotherhood of Railroad Trainmen (sometimes hereinafter referred to as the "Trainmen") is a vol-

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untary unincorporated association and labor organization, and is the only authorized representative, for purposes of collective bargaining under the Railway Labor Act, of the crafts or classes of trainmen and yardmen employed by plaintiff; defendant Charles Luna is President of the Trainmen; and defendant William Upham is General Chairman of the Trainmen on the property of plaintiff railroad.

4. At all times material hereto each of said Brotherhood defendants has been a party to separate collective bargaining agreements with plaintiff governing rates of pay, rules and working conditions of the separate crafts or classes of employees represented as aforesaid.

5. For many years prior to 1961, Lang Yard in Toledo, Ohio, was the terminal point, for train and engine crews going on and off duty, from which plaintiff operated to perform switching service for the Monsanto Chemical Company plant at Trenton, Michigan, where no terminal point had previously been established or operated by plaintiff. Under date of February 21, 1961, plaintiff advised defendant Brotherhoods of its intention to establish such a terminal point at Edison Station, in Trenton, Michigan, and inquired as to the facilities that would be required for employees going on and off duty at that point.

6. Under date of April 28, 1961, defendant Brotherhoods joined in serving on plaintiff, pursuant to Section 6 of the Railway Labor Act, a notice seeking amendment of existing collective bargaining agreements so as to cover changed working conditions of employees affected by the proposed establishment of a new terminal point. This notice was implemented by written proposals for specific benefits for such employees served on plaintiff under date of June 8, 1961.

7. Negotiations on said notice and proposals, and mediation thereon under the auspices of the National Mediation Board, failed to result in any agreement of the parties, and under date of January 1, 1963, said Board advised the parties, including plaintiff, of the failure of its mediatory efforts, and in accordance with Section 5, First, of the Railway Labor Act, requested the parties to submit the controversy to arbitration. All parties having declined arbitration, said Board, under date of March 4, 1963, notified the

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parties that, except as provided in Section 5, Third, and in Section 10 of the Act, the Board's services had that day been terminated. On April 3, 1963, said Board notified the parties of the closing of its file in the matter, which it had docketed as National Mediation Board Case No. A-6755. At the hearing herein, it was conceded by plaintiff that at that stage all of the provisions of the Railway Labor Act governing the handling and processing of the major dispute initiated by defendants' Section 6 notice of April 28, 1961, had been exhausted, and that employees of plaintiff represented by defendant Brotherhoods were at that time legally free to strike.

8. Plaintiff's rejection of arbitration of said dispute had been coupled with a representation by it that its plans to establish a terminal point at Edison Station, Trenton, Michigan, had been abandoned, and that the dispute was therefore moot; and for some time no further action in connection with such dispute was taken by plaintiff or defendants. On December 16, 1965, a new written proposal for an agreement establishing conditions to be observed in establishment of a terminal point at Trenton (Edison Station) was given plaintiff by the Trainmen, which, though embodying conditions differing in part, at least, from those contained in the June 8, 1961, proposal, related to the same basic major dispute. These proposals were rejected by plaintiff.

9. In the meantime, defendant Firemen had withdrawn their Section 6 notice of April 28, 1961, and invocation of the National Mediation Board's services in connection therewith, and on January 27, 1966, served a new Section 6 notice on plaintiff calling for amendment of the Firemen's collective bargaining agreement so as to establish Lang Yard, Toledo, Ohio, as the sole terminal point for plaintiff's operations. Negotiations on that proposal failed to result in agreement, and under date of June 17, 1966, the Firemen formally invoked the services of the National Mediation Board in connection therewith. Under date of June 28, 1966, plaintiff and the Firemen were advised by said Board that the dispute had been docketed as National Mediation Board Case No. A-7839, and as of the date of the hearing herein said matter was awaiting assignment of a mediator by the Board.

Findings of Fact and Conclusions of Law

10. Under date of September 19, 1966, plaintiff posted a bulletin directed to its employees advising of the establishment of a new train assignment, to operate out of Edison Station, Trenton, Michigan, as its terminal point, to be effective September 26, 1966. On September 23, 1966, plaintiff submitted to the National Railroad Adjustment Board a purported dispute with the Trainmen as to plaintiff's right, under its agreement with the Trainmen, to unilaterally establish new terminal points. On the same day this suit was filed, seeking an injunction against an alleged threatened strike by both defendant Brotherhoods.

11. At the hearing herein plaintiff conceded that the case involves separate causes of action, based on completely different relevant facts, against the Trainmen defendants and the Firemen defendants. Each group of defendants filed separate answers, and that of the Firemen incorporated a counterclaim against plaintiff seeking to enjoin it from unilaterally establishing the proposed terminal point at Trenton pending exhaustion of the procedures of the Railway Labor Act in connection with the aforementioned dispute currently pending before the National Mediation Board as its Case No. A-7839.

Conclusions of Law

1. Plaintiff invokes the jurisdiction of this Court under the Judicial Code (28 U.S.C., Secs. 1331 and 1337), the Interstate Commerce Act (49 U.S.C., Secs. 1 et seq.), and the Railway Labor Act (45 U.S.C., Secs. 151 et seq.).

2. Plaintiff is a common carrier by railroad in interstate commerce, and is subject to the provisions of the Railway Labor Act.

3. As to both the Firemen and the Trainmen defendants, their respective disputes with plaintiff, though separate and distinct, are primarily concerned with the amendment of existing collective bargaining agreements, and as such are "major disputes" subject to handling in accordance with the provisions of Section 6 and Section 5 of the Railway Labor Act. (*Elgin, Joliet and Eastern R. Co. v. Burley*, 325 U.S. 711.)

4. Under said Act, after exhaustion of the machinery pro-

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vided for the handling of such disputes, without agreement being reached, both parties become legally free to resort to self help, including the right of employees to strike and the right of the carrier to place in effect unilateral changes in rates of pay, rules and working conditions. (*Railroad Telegraphers v. Chicago and North Western Railroad Co.*, 362 U.S. 330; *Brotherhood of Locomotive Engineers v. B. & O. R.R. Co.*, 372 U.S. 284.) Pending exhaustion of such machinery, the "status quo" is to be maintained by both parties. (Railway Labor Act, Sec. 6 and Sec. 5; *Butte, Anaconda & Pac. Ry. Co. v. Brotherhood of L.F. & E.*, 168 F. Supp. 911, aff'd. 268 F. (2d) 54; *Baltimore & Ohio R. Co. v. United Railroad Wkrs., etc.*, 271 F. (2d) 87, 90.)

5. With respect to the Trainmen defendants, the current dispute is over working conditions to be agreed upon in connection with plaintiff's establishment of a new terminal point at Trenton, Michigan, and is the same basic major dispute that was handled through all of the procedures of the Railway Labor Act to the maturing of said defendants' admitted right to strike in 1963. There being no prohibition in said Act against the right of the Trainmen to strike, and the jurisdiction of the court to grant injunctive relief in such circumstances being withdrawn by the provisions of the Norris-LaGuardia Act (29 U.S.C., Sec. 101 et seq.), the Trainmen's right to strike to obtain agreement of plaintiff upon such conditions may not be enjoined. (See *General Committee, B.L.E. v. Missouri-K.-T. R. Co.*, 320 U.S. 323, 332-333; *Missouri-Illinois R. Co. v. Order of Railway Conductors*, 322 F. (2d) 793; *Pan American World Air. v. Flight Eng. Intern. Assoc.*, 306 F. (2d) 840; and cases cited above.)

6. Plaintiff's submission to the National Railroad Adjustment Board, coincidentally with the filing of this action, of a purported dispute with the Trainmen over its right to unilaterally establish a new terminal at Trenton, Michigan, by its terms does not deal with the establishment, by contract, of new working conditions at Trenton; and there is no evidence on the record herein to support the existence of any such contract interpretation dispute with the trainmen as that described in plaintiff's submission to said Adjustment Board. The jurisdiction of the National Railroad Adjustment Board does not extend to major disputes, such

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as that here involved, relating to the amendment of provisions of existing agreements. (*Elgin, Joliet and Eastern R. Co. v. Burley, supra; General Committee, B.L.E. v. Missouri-K.-T. R. Co., supra.*)

7. With respect to plaintiff's cause of action against the Firemen defendants, the court finds that plaintiff, having failed to comply with the *status quo* requirements of Sections 6 and 5 of the Railway Labor Act, with reference to handling of major disputes, is barred by the provisions of the Norris-LaGuardia Act, and particularly Section 8 thereof (29 U.S.C. Sec. 108) from obtaining any injunctive relief.

8. With respect to the counterclaim of the Firemen defendants against plaintiff, the court finds that in instituting Trenton, Michigan, as a new terminal point on September 26, 1966, pursuant to its bulletin of September 19, 1966, plaintiff effected a change in rates of pay, rules and working conditions, and established practices in effect prior to the time the dispute arose, which were the subject of the pending National Mediation Board Case No. A-7839, in violation of the *status quo* provisions of Section 6 and Section 5 First (b) of the Railway Labor Act, and should be enjoined to desist and refrain from such violation pending exhaustion of the major disputes handling procedures of said Act. It is well established that the court has jurisdiction to grant injunctive relief "to compel compliance with positive mandates of the Railway Labor Act". (*Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232, 237.)

9. In view of the foregoing findings and conclusions, an order will be entered dismissing plaintiff's action for injunction against defendants, and, on the Firemen defendant's counterclaim, enjoining and restraining plaintiff from operating a terminal point at Edison Station, Trenton, Michigan, or any other terminal point not previously established, unless and until its pending major dispute with the Firemen, involved in National Mediation Board Case No. A-7839, has been fully handled to a conclusion, and the right of the parties thereto to resort to self-help has been matured,

Findings of Fact and Conclusions of Law

by exhaustion of the procedures of Sections 6 and 5 of the Railway Labor Act, unless said dispute be earlier resolved by agreement between plaintiff and the Firemen.

DON J. YOUNG

United States District Judge

JUDGMENT AND DECREE OF DISTRICT COURT
(Filed November 15, 1966)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. C 66-207

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,
a corporation, *Plaintiff*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
et al., *Defendants*.

JUDGMENT AND DECREE

This cause came on to be heard on October 6, 1966, by agreement of the parties, on the merits of plaintiff's complaint for injunction, the answer of defendants, and the counterclaim of defendants Brotherhood of Locomotive Firemen and Enginemen, H. E. Gilbert and E. F. Gensler for an injunction against plaintiff, and having been tried before the Court, argued by counsel, and considered by the Court, and the court having announced its opinion and having entered its findings of fact and conclusions of law in accordance therewith, now, therefore, it is ordered, adjudged and decreed that plaintiff shall not have any relief in this action, and that the same shall be and hereby is dismissed on the merits as to all defendants.

It is further ordered, adjudged and decreed that the counterclaim of said defendants Brotherhood of Locomotive Firemen and Enginemen, H. E. Gilbert and E. F. Gensler should be and hereby is sustained, and that plaintiff, its employees, agents or representatives, and anyone acting by, through or for it, or on its behalf, be and they hereby are enjoined and restrained from establishing or operating a terminal point at Edison Station, Trenton, Michigan, or any other terminal point not previously established, unless and until its pending major dispute with said

Judgment and Decree of District Court

Brotherhood of Locomotive Firemen and Enginemen, involved in National Mediation Board Case No. A-7839, has been fully handled to a conclusion, and the right of the parties thereto to resort to self-help has been matured, by exhaustion of the procedures of Sections 6 and 5 of the Railway Labor Act, unless said dispute be earlier resolved by agreement between plaintiff and said Brotherhood.

DON J. YOUNG

United States District Judge

In conformity with Rule 77(d) F.R.C.P., please take notice that the following order or judgment was entered in this Court on Nov. 16, 1966.

C. B. WATKINS

Clerk

MOTION FOR NEW TRIAL

(Filed November 23, 1966)

[Title omitted in printing.]

Plaintiff respectfully moves the Court for an order vacating the judgment and decree heretofore entered in this cause on the 16th day of November, 1966 against plaintiff and in favor of defendants Brotherhood of Locomotive Firemen and Enginemen, H. E. Gilbert and E. F. Gensler and for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure as to said defendants.

/s/ JOHN M. CURPHEY

/s/ ROBISON, CURPHEY & O'CONNELL

Attorneys for Plaintiff

Toledo, Ohio, November 22, 1966.

[Certificate of service omitted in printing.]

OPINION OF DISTRICT COURT *
(Filed May 12, 1967)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OHIO, WESTERN DIVISION

No. C 66-207

THE DETROIT & TOLEDO SHORE LINE RAILROAD COMPANY,
Plaintiff,

VS.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
et al., Defendants.

OPINION

YOUNG, J.:

This cause arises under various provisions of the Railway Labor Act. 45 U.S.C. §§ 151 et. seq. Plaintiff sued the Brotherhood of Railroad Trainmen (hereinafter referred to as the Trainmen), the Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as the Firemen), and their respective officers for an order restraining them from striking. The Firemen counterclaimed for an injunction to prevent the plaintiff from violating the status quo provisions of the Act by unilaterally establishing a new terminal point, thereby changing the place where the employees would be required to go on and off duty. The action came on to be heard on October 7, 1966, and testimony and argument were heard at that time. This Court rendered an oral decision in which it refused to grant the injunction against the Unions, while finding for the Firemen on their counterclaim. On November 1, 1966, the findings of fact and conclusions of law of the Court were filed. Plaintiff has now moved for an order vacating the judgment with respect to the Firemen, and for a new

* Reported at 267 F. Supp. 572.

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trial pursuant to Rule 59 of the Federal Rules of Civil Procedure.

Since rather complete findings of fact have already been made, only a short summary of the facts will be repeated here. For many years Lang Yard in Toledo, Ohio has been the terminal point for train and engine crews going on and off duty, and from which switching services for the Monsanto Chemical plant at Trenton, Michigan was performed. On February 21, 1961 the railroad notified both unions of its intention to establish a new terminal point at Edison Station in Trenton, Michigan. The unions thereafter joined in seeking an amendment of the collective bargaining agreements to cover the changed working conditions pursuant to 45 U.S.C. § 156 by giving what is known as a section 6 notice. The services of the National Mediation Board were invoked but the parties failed to reach an agreement and declined arbitration. It is agreed that at this point the procedures with respect to the handling of the section 6 notice had been exhausted, and both the unions and the company were free to resort to self-help. Thereafter, certain other steps were taken by the Company and the Trainmen but this Court found that these related to the same basic dispute. This being the case, it was the Court's ruling that the dispute was a "major dispute" and that the Court therefore had no jurisdiction to enter an injunction against a strike by the Trainmen because of the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq. That determination is not an issue here since the plaintiff has asked for an order vacating the judgment only with respect to the Firemen.

The facts particularly relevant to the present motion are that on January 27, 1966, the Firemen served a new section 6 notice on the plaintiff and that this time instead of seeking amendments to the bargaining agreement to cover the changed working conditions caused by the establishment of the new terminal point, sought to amend the agreement to establish Lang Yard as the sole terminal point for plaintiff's operations. The services of the National Mediation Board were again invoked and as of the date of the hearing, the matter was awaiting assignment of a mediator.

On September 19, 1966, plaintiff posted a bulletin advis-

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ing the employees that Edison Station would be the new terminal point. This would mean that the employees would go on and off duty in Trenton, Michigan, some 30 to 40 miles north of Toledo where they had previously been based.

It was the holding of this Court that the unilateral action by the Company in posting the bulletin changing the terminal point after the services of the Mediation Board had been requested, violated the status quo provisions of sections 5 and 6 of the Act, providing that working conditions shall not be altered by the carrier until the controversy has been finally acted upon by the Board and for 30 days thereafter. The plaintiff's petition was therefore denied with respect to the Firemen, and plaintiff was enjoined from operating a terminal point at Edison Station until the exhaustion of the procedures of the Act. It is this holding which is disputed by the present motion.

It is unnecessary in this case to discuss in detail the "major" and "minor" dispute dichotomy in the Railway Labor Act. Suffice to say that if the dispute is termed major, either party may initiate the procedures of the Act by the service of a notice to change the contract pursuant to section 6.¹ If settlement cannot be reached in conference, the matter is referred to mediation under the auspices of the National Mediation Board. 45 U.S.C. § 155 (1964). The procedure for handling major disputes is designed to assist the parties in reaching agreement, and there is no authority to decide the dispute for the parties unless they agree to submit to arbitration.

After the parties have exhausted the procedures of the Act, they are free to resort to self-help and the courts may not enjoin a strike by the union nor a unilateral change in rates of pay, rules and working conditions by the carrier. *Brotherhood of Locomotive Engineers v. Baltimore & O.R.R.*, 372 U.S. 284 (1963); *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960). However, pending exhaustion of such machinery, the parties are required to maintain the status quo. Thus, while the parties are in the process of exhausting the proceedings described

¹ 45 U.S.C. § 156 (1964).

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above, the railroad may not unilaterally change the rates of pay, rules or working conditions and a court may enjoin such action. 45 U.S.C. §§ 155, 156 (1964); *United Industrial Workers of Seafarers v. Board of Trustees*, 368 F.2d 412 (5th Cir. 1966).

Plaintiff argues that the present controversy is neither a major nor a minor dispute but rather that it involves a matter of management prerogative.

For the procedures of the Railway Labor Act to be applicable there must first be a "labor dispute." Thus, for example, if management decided to install new machinery which did not in any way affect the terms or conditions of employment nor violate the collective bargaining agreement, it could do so without prior consultation with the union. If the union takes strike action concerning a non-bargainable matter, a court may issue a strike injunction because the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, preventing injunctions in "labor disputes" is not applicable. See *Chicago & N.W. Ry. v. Order of R.R. Telegraphers*, 264 F.2d 254, 260 (7th Cir. 1959), *rev'd on other grounds*, 362 U.S. 330 (1960).

The Supreme Court case of *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960) involved facts which were substantially similar to the case at bar. In that case the railroad filed petitions with the public utility commissions in several of the states in which it operated asking permission to eliminate certain of its railroad stations. Recognizing that the plan would result in a loss of jobs, the union gave a section 6 notice to amend the bargaining agreement to state that no position could be abolished or discontinued except by agreement between the carrier and the organization. The Court held that the case grew out of a "labor dispute" and that by reason of the Norris-LaGuardia Act, the district court was without authority to enjoin the strike.

The Norris-LaGuardia Act defines a labor dispute as follows:

"any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining,

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changing, or seeking to arrange terms or conditions of employment. . . ."²

The Court said that the controversy clearly involved an effort to change the terms of an existing agreement, and that that term related to a condition of employment. Furthermore, the trend has been to broaden, not narrow the scope of subjects about which workers and railroads may bargain collectively. The Court finally noted that it is "too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees. . . ."³

Plaintiff attempts to distinguish the *Railroad Telegraphers* case by pointing out that the union there only objected to the abolition of jobs, and did not seek a veto over the carrier's right to determine the location of stations, while in the present case the Firemen seek to amend the agreement to make Lang Yard in Toledo the sole terminal point. The proposed rule actually seeks to establish that all crewmen will report to duty and go off duty at Lang Yard and not 35 miles north of Toledo. Certainly this is a proper subject for bargaining. The controversy concerns the terms of a proposed change in the collective bargaining agreement, and those terms relate to a condition of employment.

Plaintiff argues that *Brotherhood of R. R. Trainmen v. New York Cent. R. R.*, 246 F.2d 114 (6th Cir.) *cert denied* 355 U.S. 877 (1957) is controlling in this circuit. This Court believes, however, that that case was overruled by the *Railroad Telegraphers* case, and that the present controversy is a labor dispute not involving a matter solely within the discretion of management.

The second contention of the railroad is that even assuming we are dealing with a labor dispute, and that it is a "major dispute," its own action in establishing a terminal at Trenton prior to the termination of mediation with respect to the Firemen's 1966 notice did not violate the status quo provisions of sections 5 and 6 of the Act. The position of plaintiff is that its contract with the Firemen does not

² 29 U.S.C. § 113(c).

³ 362 U.S. 330, 339 (1960).

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prohibit the establishment of new terminals for road service assignments, and that the status quo requirements of section 6 prohibit only changes in rates of pay, rules, or working conditions fixed by the parties' collective bargaining agreement. In other words, section 6 applies only when the proposed change in the agreement directly conflicts with a provision of the present contract. In support of this contention plaintiff cites a report of the National Mediation Board which reads in part as follows:

"Section 6 states that where notice of intended change in an agreement has been given, rates of pay, rules, and working conditions *as expressed in the agreement* shall not be altered by the carrier until the controversy has been finally acted upon in accordance with specified procedures. Positively stated, section 6 is intended to maintain the contract as it existed between the parties until the provisions of the act have been complied with."⁴ (Emphasis added.)

But the phrase "as expressed in the agreement" does not appear in section 6 of the Act, and this language appears to have been added by the Board. This Court does not think that such a limitation on the application of the status quo requirements is sound. The general scheme of the statute indicates that the purpose of the status quo provision is to aid the National Mediation Board in its function of helping the parties to reach an agreement. If the carrier can unilaterally change the working conditions of its employees while such conditions are the subject of mediation efforts by the Board, the work of the Board would be greatly hampered. Thus, it would appear that whenever the services of the Board have been invoked, its jurisdiction should be protected by the application of the provisions of section 6 even if the particular condition is not fixed by the existing agreement. There is no reason why the status quo provisions should not apply whenever the Board is mediating a dispute.

Furthermore, the limitation which the plaintiff places on

⁴ Thirty-First Annual Report of the National Mediation Board 25 (1965).

Opinion of District Court

the application of the status quo provision is unsupported by case law. In *Williams v. Jacksonville Terminal*, 315 U.S. 386 (1942) the Court did state that the prohibitions of section 6 against changes in wages and working conditions pending bargaining are aimed at "preventing changes in conditions previously fixed by collective bargaining agreements."⁵ However, the facts in that case were not even remotely analogous to the present situation, and the legal issues were different. There had been no previous collective bargaining agreement and there was no history of bargaining between the terminal and certain of its employees called "red caps." However, on October 11, 1938 the red caps notified the terminal that they had selected a union to represent them. The union representative then asked for a conference for the purpose of negotiating a collective bargaining agreement. But no section 6 notice was ever given because there was no existing agreement to amend. The carrier thereafter delivered to each red cap a letter stating that his weekly wage in the future would be the difference between the minimum wage set by the newly enacted Fair Labor Standards Act and the amount of tips received by him each week. An agreement was subsequently reached with regard to working conditions and hours but it omitted any reference to wages. The union representative then sued the terminal for wages due to the red caps under the Fair Labor Standards Act. The union contended among other things that the railroad could not apply the tips to the minimum wage figure because to do so violated the status quo provisions of the Railway Labor Act. The Court held that section 6 did not apply. This result is quite logical because section 6 applies only to intended changes in collective bargaining agreements and there was no agreement in existence to change. The decision of the Court, however, is not relevant to the present controversy, because the Firemen and the plaintiff have an agreement in effect and a section 6 notice has been given proposing that it be changed. The Board's services have therefore properly been invoked, and its jurisdiction to mediate should be protected.

The case of *Norfolk & Portsmouth Belt Line R.R. v.*

⁵ 315 U.S. 386, 402-403 (1942).

Opinion of District Court

Brotherhood of R.R. Trainmen, 248 F.2d 34 (4th Cir.) cert. denied, 355 U.S. 914 (1957), is also not in point. The Court used language which supports plaintiff's contention but it is dictum, since the final determination was that the controversy was a minor dispute.

Thus, the language which the Board read into the Act in its report cited above is supported neither by sound reasoning nor by case law. Therefore, this Court will not limit the application of the status quo provisions which are clearly set forth in section 6.

The plaintiff's motion for an order vacating the judgment of this Court entered on November 16, 1966 and for a new trial will therefore be denied.

DON J. YOUNG

United States District Judge

Toledo, Ohio.

ORDER OF DISTRICT COURT

(Filed May 12, 1967)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OHIO, WESTERN DIVISION

No. C 66-207

THE DETROIT & TOLEDO SHORE LINE RAILROAD COMPANY,
Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
et al., Defendants.

ORDER

For the reasons set forth in the accompanying opinion,
it is now

ORDERED that the plaintiff's motion for an order vacating
the judgment of this Court entered on November 16, 1966
and for a new trial will be denied.

DON J. YOUNG
United States District Judge

Toledo, Ohio.

In conformity with Rule 77(d) F. R. C. P., please take
notice that the following order or judgment was entered in
this Court on May 12, 1967.

C. B. WATKINS,
Clerk

OPINION OF COURT OF APPEALS *

(Filed October 7, 1968)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18059

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,
Plaintiff-Appellant,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Defendant-Appellee.

Decided October 7, 1968.

APPEAL from the United States District Court,
Northern District of OhioBefore: McCREE and COMBS, Circuit Judges, and CECIL,
Senior Circuit Judge.

COMBS, Circuit Judge. The Detroit and Toledo Shore Line Railroad [Shore Line] brought suit to enjoin a threatened strike by the Brotherhood of Locomotive Firemen and Enginemen [BLF&E]. The BLF&E counterclaimed, seeking to enjoin a change in work assignments proposed by Shore Line. The District Court dismissed Shore Line's complaint and issued the injunction sought by BLF&E, 267 F.Supp. 572 (1967). This appeal followed.

Shore Line's main line of railroad runs from Toledo, Ohio to Detroit, Michigan. Until 1961, all work assignments for Shore Line's crews started and ended at Lang Yard in Toledo. An increasing volume of business in Trenton, Michigan caused Shore Line to consider the establishment of a terminal there. A major difficulty in this regard stemmed from the fact that all of its work assignments for many years had originated at Lang Yard, thirty-three miles away.

* Reported at 401 F. 2d 368.

Opinion of Court of Appeals

Thus, to service a train starting and ending its run in Trenton, it was necessary to transport the work crews to and from Lang Yard each day.

In 1961, Shore Line notified three unions representing its employees, including BLF&E, that certain designated work assignments would henceforth originate in Trenton. The unions served notice on Shore Line, pursuant to Section 6 of the Railway Labor Act, proposing certain special working conditions for employees who would operate out of Trenton. Conferences on these notices brought no agreement and the matter was referred to the National Mediation Board. While the case was pending before the Board, Shore Line established two new work assignments to originate in Dearoad, Michigan, eleven miles north of Trenton. The crews operating out of Dearoad were driven to Trenton by a taxicab service operated by Shore Line.

When the Dearoad work assignments were announced, the BLF&E withdrew from the Mediation Board proceedings and, before a Special Board of Adjustment, challenged Shore Line's right to establish the new work assignments.¹ It was asserted that these assignments were contrary to the collective bargaining agreement between the parties. On November 30, 1965, the Special Board ruled that the Shore Line-BLF&E bargaining agreement did not prohibit the establishment of outlying work assignments.

Shortly after the action by the Special Board, Shore Line revived its plan to originate work assignments out of Trenton. Learning this, BLF&E served a Section 6 notice on Shore Line, proposing an amendment to the existing collective bargaining agreement to the effect that "all road service runs and/or assignments will originate and terminate at Lang Yard. . . ." The parties, being unable to agree, submitted the matter to the National Mediation Board. Notwithstanding this action, Shore Line posted notices announcing two work assignments to originate at Trenton. The BLF&E threatened to strike and this action was initiated.

¹ The BLF&E decided to treat the controversy as a "minor dispute." Under Section 3 of the Railway Labor Act, such disputes are settled by an Adjustment Board whose interpretation of the contract is binding on the parties. See *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945).

Opinion of Court of Appeals

The District Court enjoined Shore Line from "establishing or operating a terminal point at Edison Station, Trenton, Michigan, or any other terminal point not previously established. . . ." The injunction was grounded on the Section 6 requirement that, following issuance of a notice under that section or the National Mediation Board's proffer of services, a carrier may not alter "rates of pay, rules, or working conditions" until Section 6 procedures have been exhausted.

Shore Line asserts that the District Court's decision is erroneous for two reasons. First, it is contended that the status quo provision in Section 6 of the Act applies only to changes in "rates of pay, rules, or working conditions" which are embodied in the bargaining agreement, and that no terminal point is established in the bargaining agreement. We find this argument to be lacking in merit for the reasons stated in the opinion of the District Judge.

Second, it is argued by Shore Line that the establishment of a railway terminal is not bargainable because it is a managerial prerogative. This argument would have great force if the District Court's judgment prevented the company from constructing physical facilities known as a "terminal" or from using such facilities as a terminal. But such is not the case. The controversy here is focused on where work assignments will commence and end—the place where employees will report on and off duty. We find nothing in the correspondence between the parties, in the testimony of the witnesses, or in the opinion of the District Judge which would indicate that the judgment of the District Court should be given a broader meaning.

The question before the District Court was whether the place where employees for many years have originated and terminated their work days is a "working condition" which can be changed unilaterally by the employer without exhausting the bargaining procedures required by Section 6 of the Act. We note that it is stated by the District Judge in his opinion: "The proposed rule actually seeks to establish that all crewmen will report to duty at Lang Yard and not 35 miles north of Toledo."

Opinion of Court of Appeals

It was held by the District Judge that this is a proper subject for bargaining and, as we construe the judgment, that is all that was held. We agree with the reasoning of the District Judge and with his conclusion.

Judgment affirmed.

JUDGMENT OF COURT OF APPEALS
(Filed October 7, 1968)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18,059

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,
Plaintiff-Appellant,

VS.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
ET AL., Defendants-Appellees.

BEFORE: MCCREE and COMBS, Circuit Judges and CECIL,
Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk

Judgment of Court of Appeals

Issued as Mandate:

Costs:

Filing fee	\$
Printing	\$
Total	\$

ORDER GRANTING MOTION TO SUBSTITUTE
(Filed March 3, 1969)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1968

No. 900

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

UPON CONSIDERATION of the motion to substitute United Transportation Union in place of Brotherhood of Locomotive Firemen and Enginemen as the party respondent,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

March 3, 1969

Supreme Court of the United States

No. 900 ----- , October Term, 19 68

**The Detroit and Toledo Shore Line Railroad
Company,**

Petitioner,

v.

United Transportation Union

ORDER ALLOWING CERTIORARI. Filed March 3 ----- , 19 69.

The petition herein for a writ of certiorari to the United States Court of

Appeals for the **Sixth -----** Circuit is granted, and the
case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of
the proceedings below which accompanied the petition shall be treated as though
filed in response to such writ.

Office-Supreme Court, U.S.

FILED

JAN 4 1969

DAVID S. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~8000~~ 29

THE DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY, *Petitioner*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No.

THE DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY, *Petitioner*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 7, 1968.

Opinions Below

The original oral opinion of the district court, set forth in Appendix D hereto, pp. 19a-23a, *infra*, is not reported. The opinion of the district court on motion to vacate the judgment, set forth in Appendix C hereto, pp. 11a-18a, *infra*, is reported at 267 F. Supp. 572. The opinion of the court of appeals, set forth in Appendix B hereto, pp. 8a-10a, *infra*, is reported at 401 F.2d 368.

Jurisdiction

The judgment of the court of appeals, set forth in Appendix E hereto, p. 24a, *infra*, was entered October 7, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

A railroad's right under its existing collective bargaining contract to establish outlying work assignments has been established conclusively by an adjustment board determination under Section 3 of the Railway Labor Act (45 U.S.C. § 153) and is not disputed by the union. The railroad decided, for business reasons, to create an outlying assignment. Upon learning that, the union served a notice under Section 6 of the Act (45 U.S.C. § 156) proposing that the agreement be changed to abrogate the railroad's right to establish outlying assignments. The question presented is:

Does Section 6 of the Act prohibit the railroad from establishing outlying assignments during negotiations upon the union's notice—i.e., *does Section 6 prohibit a railroad from taking action permitted by its existing collective bargaining contract during negotiations upon a union proposal to amend the contract to prohibit such action?*

Statutes Involved

The statute principally involved is Section 6 of the Railway Labor Act (45 U.S.C. § 156):

“Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are

being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Other provisions of the Railway Labor Act are also involved and printed in Appendix A, pp. 1a-7a, *infra*.

Statement

The Detroit and Toledo Shore Line Railroad, the petitioner herein, instituted this action to enjoin a strike threatened by the Brotherhood of Locomotive Firemen and Enginemen (BLF&E). The BLF&E counterclaimed to enjoin the Shore Line from establishing work assignments originating at points not previously used as terminal points. The district court dismissed the Shore Line's complaint and granted the injunction sought by the BLF&E. The court of appeals affirmed. The Shore Line now seeks review by this Court.

The main line of the Shore Line runs from Toledo, Ohio to Detroit, Michigan. Until 1961, work assignments for the Shore Line's crews all started and ended at Lang Yard in Toledo. However, because of an increasing volume of business in Trenton, Michigan, the Shore Line decided to establish another terminal at that point (pp. 8a, 26a, *infra*).

Accordingly, in 1961 the Shore Line notified three unions representing its employees, including the BLF&E, that certain work assignments would henceforth originate in Trenton. The unions responded by serving the Shore Line with notices pursuant to Section 6 of the Railway Labor Act (45

U.S.C. § 156) proposing certain special working conditions for employees who would operate out of Trenton. Conferences on the notices failed to settle the matter, which therefore was referred to the National Mediation Board for mediation. While the matter was pending before the Board, the Shore Line established two new work assignments originating in Dearoad, Michigan, eleven miles north of Trenton (pp. 8a-9a, 26a, *infra*).

After the Dearoad work assignments were announced, the BLF&E abandoned its Section 6 notice proposing a change in the parties' agreements, and claimed instead, before a Special Board of Adjustment established under Section 3 of the Railway Labor Act (45 U.S.C. § 153), that "the establishment of these new runs violated" the existing collective agreement between the parties (P.A. 71a-72a;¹ pp. 9a, 27a, *infra*). However, the Special Board ruled that the establishment of outlying work assignments was permissible under the collective agreement (pp. 9a, 32a, 33a, *infra*). As the court below observed, the Special Board's ruling on the parties' "minor dispute" as to the interpretation of the agreement "is binding on the parties" under Section 3 of the Railway Labor Act (45 U.S.C. § 153) (pp. 9a, 2a-4a, *infra*).²

When the Special Board had confirmed the Shore Line's right, under the existing collective agreement, to establish outlying work assignments, the Shore Line revived its plan to establish assignments originating at Trenton. Learning this, the BLF&E served a new Section 6 notice on the Shore Line, proposing that the existing agreement be amended to provide that "all road service runs and/or assignments will originate and terminate at Lang Yard. . . ." The proposed amendment to the agreement would abrogate the Shore Line's right to establish outlying work assignments (pp. 9a, 27a, *infra*).

¹ Plaintiff-Appellant's Appendix in the court below.

² See, e.g., *Gunther v. San Diego & A.E.R. Co.*, 382 U.S. 257 (1965).

The parties were unable to reach an agreement upon the BLF&E's proposal. Consequently, the BLF&E sought mediation by the National Mediation Board. Subsequently, the Shore Line posted notices announcing the establishment of two new work assignments originating at Trenton. The BLF&E threatened to strike, and this action followed (pp. 9a, 27a-28a, *infra*).

The district court enjoined the Shore Line from "establishing or operating a terminal point at Edison Station, Trenton, Michigan, or any other terminal point not previously established" (pp. 9a, 31a, *infra*). The injunction was purportedly grounded on Section 6 of the Railway Labor Act (45 U.S.C. § 156), which provides that carriers and unions shall give thirty days' notice of "an intended change in agreements affecting rates of pay, rules, or working conditions," and that "[i]n every case where such notice of intended change has been given, . . . rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board . . ." (pp. 9a, 30a, *infra*).³

The Shore Line moved for reconsideration. It pointed out that in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 402-403 (1942), this Court had held that under Section 6 the making of a proposal for an agreement "does not change the authority of the carrier" because the "prohibitions of § 6 against changes of wages or conditions pending bargaining . . . are aimed at preventing changes in conditions *previously fixed by collective bargaining agreements*"

³ Initially, the injunction was grounded on Section 5 of the Act (45 U.S.C. § 155) as well as on Section 6 (p. 30a, *infra*). Section 5 contains a status quo requirement that applies after the Mediation Board terminates its services. See p. 5a, *infra*. The Mediation Board has not terminated its services in this case (pp. 12a, 28a, *infra*). Accordingly, the district court relied only on Section 6 when it denied the Shore Line's motion to vacate the judgment (pp. 16a-18a, *infra*), as did the court of appeals when it affirmed (pp. 9a, 10a, *infra*).

(emphasis added). In addition, the Shore Line pointed out that the National Mediation Board has stated repeatedly, in accordance with this Court's holding in *Williams*, that "the serving of a Section 6 notice for a new rule or a change in an existing rule does not operate as a bar to carrier actions which are taken under rules currently in effect"—i.e., that "Section 6 is intended to maintain the contract as it existed between the parties until the provisions of the act have been complied with." NMB, 33d Ann. Rep. 36 (1968). The district court held, however, that this Court's holding in *Williams* applies only to the rare case in which there is no collective agreement in existence, and that the Mediation Board had misinterpreted Section 6 (pp. 15a-17a, *infra*).

On appeal, the Sixth Circuit affirmed. The Shore Line contended, as it had in the district court, that the status quo provision in Section 6 applies only to changes in rates of pay, rules, or working conditions which are embodied in the collective bargaining contract. The court of appeals rejected that contention, however, holding it "lacking in merit for the reasons stated in the opinion of the District Judge" (pp. 9a-10a, *infra*).

The Shore Line now seeks review by this Court.

Reasons for Granting the Writ

In *Locomotive Engineers v. M.-K.-T. R. Co.*, 363 U.S. 528 (1960), this Court examined the nature of a carrier's obligation to maintain the "status quo" during the pendency of a "minor" dispute as to the interpretation of existing agreements. In this case we ask the Court to determine the nature of a carrier's obligation to maintain the "status quo" during the pendency of a "major" dispute as to a proposed change in agreements.⁴ There is no more important ques-

⁴ For the distinction between the "major" and "minor" disputes of the railway labor world, see *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723 (1945).

tion with respect to railway labor relations before the courts today. We believe it deserves review.

1. The decision below is directly in conflict with applicable decisions of this Court. The court below held that Section 6 prohibits changes in working conditions following the service of a Section 6 notice when the carrier's right to make the changes under existing agreements is indisputable and, indeed, is conceded (pp. 9a-10a, 15a-18a, 22a, *infra*). That holding is contrary to this Court's decision in *Williams v. Jacksonville Terminal Co.*, *supra*, 315 U.S., at 401-403. In that case, redcaps at the Dallas Terminal, who previously were unrepresented, selected a collective bargaining representative. The representative then served the Terminal with a request "for a conference to negotiate an agreement for working conditions and other related subjects. . . ." 315 U.S., at 402. For at least thirteen years before that, redcaps had been permitted to keep their tips without accounting for them to the Terminal. 33 F. Supp. 244, at 248. While the request for a contract was pending, however, the Fair Labor Standards Act became effective. The Terminal notified the redcaps that henceforth they would be required to account for their tips and the Terminal would pay them the difference between the tips and the statutory minimum wage. The redcaps contended that the Terminal had changed their rates of pay and working conditions in violation of the status quo requirements of Sections 2 Seventh⁵ and 6 of the Railway

⁵ Section 2 Seventh provides that "[n]o carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act" (45 U.S.C. § 152 Seventh, p. 1a, *infra*). This provision does not bar a carrier from changing rates of pay, rules, or working conditions which are *not* embodied in agreements. *Illinois Central R. Co. v. Brotherhood of Loc. Fire. & Eng.*, 332 F.2d 850 (7th Cir., 1964); *St. Louis, S. F. & T. R. Co. v. Railroad Yardmasters*, 328 F.2d 749 (5th Cir., 1964).

Labor Act. This Court rejected that contention, holding that:

“The institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibitions of § 6 against changes of wages or conditions pending bargaining and those of § 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agreements. Arrangements made after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose.” 315 U.S., at 402-403.

The decision below is contrary to that unqualified holding in *Williams*. The district court was of the view that the holding in *Williams* applies only to cases in which the parties do not yet have a collective bargaining contract—the situation in *Williams*. See pp. 16a-17a, *infra*. But that is a fact about *Williams* that looks the other way. As this Court stated, “[a]rrangements made after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose.” Therefore, the rights of a carrier *after* the parties have entered into a collective bargaining contract (as in this case) should be entitled to more, not less, protection than the rights of a carrier before there is any contract. The decision of the Special Board of Adjustment (p. 4, *supra*; p. 32a, *infra*) established conclusively that under its existing agreements the Shore Line had the right to establish outlying assignments.⁶

⁶ What the district court said with respect to *Williams* was that this Court had “held that section 6 did not apply . . . because section 6 applies only to intended changes in collective bargaining agreements and there was no agreement in existence to change” (p. 17a, *infra*). However, this

This Court has never retreated from its holding in *Williams*. On the contrary, in *Order of Conductors v. Pitney*, 326 U.S. 561, 565 (1946), it reiterated the view that "the only conduct which would violate § 6 is a change of those working conditions which are 'embodied' in agreements." We submit that there is no sound basis for narrowing the rule of *Williams* and *Pitney*. But in any event, if that rule is to be limited to the extremely rare case in which there is no collective contract at all, as was held below, it should be this Court that restricts its previous holdings, not a lower court.

2. The decision below also is contrary to decisions by other courts of appeals and by several district courts.

a. The decision below conflicts directly with two decisions of the Seventh Circuit. In *Hilbert v. Pennsylvania R. Co.*, 290 F.2d 881 (7th Cir., 1961), the Seventh Circuit held that a railroad's right to change the location of crew terminals,

Court has indicated that a proposal to make an agreement when "there [is] no agreement in existence to change" is a request for a "change in agreements" within the meaning of Section 6. In its landmark exposition of the Railway Labor Act in *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723 (1945), the Court said that the "major" dispute procedures of the Act (prescribed by Sections 5, 6 and 10, 45 U.S.C. §§ 155, 156, 160) relate "to disputes over the formation of collective bargaining agreements or efforts to secure them," and that such disputes "arise where there is no such agreement or where it is sought to change the terms of one . . ." (emphasis added). Otherwise, in the absence of a preexisting agreement a union could strike to obtain an agreement without first exhausting the major dispute procedures, something Congress obviously did not intend when it enacted the Railway Labor Act "to provide a machinery to prevent strikes," *Texas & N.O.R. Co. v. Ry. Clerks*, 281 U.S. 548, 565 (1930). Therefore, the redcaps' written demand for a collective bargaining agreement in *Williams* was sufficient to invoke the procedures of Section 6 and thus to bring into play the status quo requirement of Section 6. See 315 U.S., at 402-403; cf. *Pullman Co. v. Order of Ry. Conductors & Brakemen*, 316 F.2d 556, 562 (7th Cir., 1963). What the Court held in *Williams* was not that Section 6 does not apply in the absence of a prior agreement, as the district court believed, but that the carrier's action did not violate Section 6 because it did not violate an existing agreement. 315 U.S., at 402-403.

following the service of a notice proposing modification of existing agreements with respect to the matter (see 290 F.2d, at 885; 307 F.2d, at 24-25 n. 1), turned on whether such changes were permissible under the applicable rule established by the existing agreements—"that rule remains in effect." 290 F.2d, at 885. Similarly, in *Illinois Central R. Co. v. Brotherhood of Railroad Train.*, 398 F.2d 973 (7th Cir., 1968), the Seventh Circuit approved a holding that a railroad's right to reduce the number of trainmen assigned to certain crews, following the service of a notice proposing a prohibition of such reductions (398 F.2d, at 975 n. 2), depended on whether the reductions were permitted by rules already in existence. 398 F.2d, at 975, 979. See also *Rutland Ry. Corp. v. Brotherhood of Locomotive Eng.*, 307 F.2d 21 (2d Cir., 1962), reversing 188 F.Supp. 721 (D. Vt., 1960), in which the Second Circuit reached conclusions similar to those of the Seventh Circuit in *Hilbert*. In each of these cases, the unions were denied injunctive relief based on the status quo provision in Section 6 in the absence of an adjustment board determination that the carrier's actions were *prohibited* by existing rules. 290 F.2d, at 882, 885-886; 398 F.2d, at 975, 979; 188 F.Supp., at 723, 728. In the case now before this Court, however, the union was granted such relief *notwithstanding* an adjustment board determination that the carrier's actions were *permitted* by existing rules. See p. 4, *supra*; p. 32a *infra*. Thus, these decisions are squarely in conflict.⁷

⁷ In the court below, respondent contended that the cases referred to above are "not in point" because they "involved minor as well as major disputes." In each case the parties disagreed as to whether the carrier's actions were permitted by existing rules. Thus, in addition to the major dispute created by the service of a Section 6 notice proposing a change in the applicable agreement, each case also involved a minor dispute as to the interpretation of the agreement. So, too, in the instant case, there once was a minor dispute between the parties as to the Shore Line's right under the existing agreement to establish outlying assignments. That dispute has now been determined, in the Shore Line's favor, and it is conceded

b. The decision below also is directly in conflict with a decision of the District of Columbia Circuit, *Southern Ry. Co. v. Brotherhood of Locomotive Firemen, Etc.*, 337 F.2d 127 (D.C. Cir., 1964). In that case the Southern served the BLF&E with a notice proposing the abrogation of rules requiring assignment of firemen to diesel locomotives. 337 F.2d, at 130. For years the collective agreement had provided that "[a] fireman . . . shall be employed on all locomotives," and, accordingly, the Southern had assigned firemen to all locomotives including diesel locomotives. 337 F.2d, at 129. However, it began operating diesel locomotives without firemen, claiming that the existing agreement only required it to place firemen on such locomotives when there were firemen available who were on the seniority roster when the agreement was made. The BLF&E sought an injunction

"... because the Section 6 notice served by Southern, proposing to change the existing agreement with respect to use of firemen on locomotives, was still pending before the National Mediation Board and Section 6 of the Railway Labor Act prevented the change in working conditions involved in operating trains without firemen in such circumstances." 337 F.2d, at 131.

that the existing agreement does not prohibit the establishment of such assignments. See p. 4, *supra*; p. 32a, *infra*. That fact obviously does not distinguish the Shore Line's case; it makes it *a fortiori*.

Not only was the union in *Hilbert* denied a status quo order based on Section 6 (the aspect of the case that is relevant here) but it was also denied a status quo order based on *Locomotive Engineers v. M.-K.-T. R. Co.*, *supra*, 363 U.S. 528—*i.e.*, an order prohibiting carrier action pending determination of the parties' minor dispute. See 290 F.2d, at 885. In the *Illinois Central* case, on the other hand, the court required the carrier to preserve the "status quo" pending a determination of the parties' minor dispute; an adjustment board eventually determined that dispute in the union's favor; and at that point entry of a status quo order based on Section 6 was quite properly held to be appropriate. See 398 F.2d, at 975, 976, 979.

The district court granted injunctive relief, and the court of appeals affirmed. The court of appeals reasoned that to allow "a change in the long-standing interpretation . . . which had been given by the parties to the existing contract" would "in substance and effect change the contract itself." 337 F.2d, at 132. However, the court went on to hold—and this is the salient aspect of the decision for present purposes—that the injunction could not remain in effect if an adjustment board were to determine that operation of diesels without firemen was permissible under the existing agreement:

"[W]e think that the District Court properly ordered . . . that the injunction will remain effective until either the NRAB interprets the contract in Southern's favor or until the contract is modified or changed under the Railway Labor Act. The NRAB of course is not ordinarily concerned with Section 6 proposals, but here the contract change proposed under Section 6 would be put into effect immediately by the change in the long-standing prior interpretation and application of the old contract. To be effective and to effectuate the command of Section 6, the injunction under the Section 6 claim must, pending exhaustion of the statutory processes for negotiation of a new contract under the Act, properly preclude such a change in interpretation until such change is authorized by the NRAB, even granting that ordinarily the change could not be enjoined." 337 F.2d, at 132-133.

In short, notwithstanding the carrier's long-established practice, the court of appeals held that the injunction against the operation of diesels without firemen could not remain in effect in the face of an adjustment board determination that such operation was permitted by the existing agreement. But in the case now before this Court, the Sixth Circuit

affirmed an injunction against the establishment of outlying assignments *after* an adjustment board determination that the establishment of such assignments is permitted by the existing agreement. The two decisions are irreconcilable.

c. The decision below also is contrary to the considered view of the Fourth Circuit as to the meaning of this Court's decision in *Williams*:

"... the prohibitions of [Sections 2 Seventh and 6] fall short of unilateral changes made in accordance with the terms of the applicable agreements and are limited to changes in those working conditions which are embodied in the agreement. See *Williams v. Jacksonville Terminal Company*. . . ." *Norfolk & P.B.L.R. Co. v. Brotherhood of Rail. Train.*, 248 F.2d 34, 41 (4th Cir. 1957).

d. In addition, the decision below conflicts directly with four district court decisions—in the Northern District of Illinois, *Railway Clerks v. Santa Fe R. Co.*, 50 CCH Lab. Cas. ¶ 19,299 (N.D. Ill., 1964), pp. 40a-46a, *infra*; in the Southern District of California, *Flight Engineers v. Western Air Lines*, 43 CCH Lab. Cas. ¶ 17,064 (S.D. Cal., 1961), pp. 47a-55a, *infra*; in the Eastern District of Missouri, *Brotherhood of Railroad Trainmen v. Illinois Terminal R. Co.*, No. 66 C 96 (3), May 24, 1966 (unreported), pp. 56a-59a, *infra*; and in the Southern District of Mississippi, *Transportation-Communication Employees Union v. Illinois Central R. Co.*, No. 4192, October 4, 1967 (unreported), pp. 60a-63a, *infra*.^{*} Thus, for example, in *Flight Engineers v. Western Air Lines*, *supra*, the court held that:

^{*} The oral opinion in *Spokane, Portland & Seattle R. Co. v. Order of Railway C. & B.*, 265 F. Supp. 892, 894 (D.D.C., 1967), appears to be to the contrary, but the conflicting implications of that opinion were negated by the court when it entered its order (pp. 64a-67a, *infra*).

“... the prohibitions of Section 6 against changes in rules or working conditions pending bargaining, ... apply only to rules and working conditions previously fixed by collective bargaining agreements. *Williams v. Jacksonville Terminal Co.* . . .” 43 CCH Lab. Cas., at p. 24,915, pp. 54a-55a, *infra*.

3. The decision below also is contrary to the long-standing interpretation of Section 6 by the National Mediation Board, the administrative agency which administers the relevant sections of the Railway Labor Act.⁹ In accordance with this Court's ruling in *Williams*, the Mediation Board has stated in its annual reports for a number of years that:

“Another type of situation involves the case where an organization serves a proper section 6 notice on the carrier proposing to restrict the right of the carrier to unilaterally act in a certain area. Handling of the proposal through various stages of the Railway Labor Act has not been completed when complaints will sometimes be made that the carrier is not observing the ‘status quo’ provisions of section 6 when it institutes an action which would be contrary to the agreement if the proposed section 6 notice had at that time been accepted by both parties.

“Section 6 states that where notice of intended change in an agreement has been given, rates of pay, rules, and working conditions as expressed in the agreement shall not be altered by the carrier until the controversy has been finally acted upon in accordance with

⁹ Administrative practice embodying an interpretation of a statute, consistently followed over a long period, is entitled to great weight in construing the statute. See, *e.g.*, 1 Davis, *Administrative Law*, § 5.06 (1958); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

specified procedures. Positively stated, section 6 is intended to maintain the contract as it existed between the parties until the provisions of the act have been complied with. When the procedures of the act have been exhausted without an agreement between the parties on the 30-day notice of intended change, the carrier may alter the contract to the extent indicated in the 30-day notice, and the organization is free to take such action as it deems advisable under the circumstances. The other provisions of the contract are not affected and remain unchanged. In brief, *the rights of the parties which they had prior to serving the notice of intention to change remain the same during the period the proposal is under consideration, and remain so until the proposal is finally acted upon. The Board has stated in instances of this kind that the serving of a section 6 notice for a new rule or a change in an existing rule does not operate as a bar to carrier actions which are taken under rules currently in effect.*" NMB, 33d Ann. Rep. 36 (1968) (emphasis added).

As the Mediation Board indicated in the foregoing passage in its most recent annual report, it has been faced with the question presented here many times in the past in performing its duties under the Railway Labor Act. For example, on May 12, 1960, the Board issued instructions to its mediators in which it set forth its interpretation of the status quo provision in Section 6. See pp. 34a-37a, *infra*. Those instructions quoted the Board's response to a complaint that a railroad had violated its obligation to maintain the "status quo" by changing "territorial limits and assignments" following the service of a Section 6 notice regarding the matter (p. 35a, *infra*):

"The Board considered your letter of August 10, 1956 in Executive Session on August 16, 1956. The Carrier has taken the position that the proposed rearrangement of sections and the consequent changes in forces are permissible under the present agreement, and if a dispute exists as to the application of the present rules it should be taken before the National Railroad Adjustment Board.

"The National Mediation Board does not understand Section 6 of the Railway Labor Act to mean that proposed revisions of agreement rules and the invocation of this Board's services on such proposed changes has the effect of staying the application of existing rules unless and until such existing rules are amended or revised.

"In view of the language of Section 2, Seventh of the Railway Labor Act stating 'No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this act.', the Board fails to find any basis for complying with your request."

As indicated in its annual reports, the Board has consistently interpreted Section 6 in this fashion for many years.¹⁰

4. Moreover, we think it reasonably clear on the face of the Railway Labor Act that the decision below was in error—i.e., that Section 6 means just what this Court said it meant in *Williams*. Prior to the service of a Section 6 notice, the carrier's obligations are governed by Section 2 Seventh of the Act (45 U.S.C. § 2 Seventh), which provides that "[n]o

¹⁰ At least one adjustment board established under Section 3 of the Act likewise has ruled that a Section 6 notice does not operate as a bar to carrier action taken under rules currently in effect. See pp. 38a-39a, *infra*. We are aware of no adjustment board decisions to the contrary.

carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act." (See p. 7, n. 5, *supra*.) The first sentence of Section 6 then provides that "[c]arriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions," and the second sentence of Section 6 goes on to provide that "[i]n every case where such notice of intended change has been given, . . . rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . by the Mediation Board" (45 U.S.C. § 156).

The phrase "rates of pay, rules, or working conditions" in the second sentence of Section 6 is literally unrestricted. But Congress did not intend the phrase to be unrestricted in application. No one contends, for example, that service of a notice proposing a change in agreements relating to terminal points precludes a carrier from changing the number of men assigned to train crews if the parties' agreements permit such changes—i.e., no one contends that the service of a Section 6 notice precludes a carrier from changing "working conditions" that are wholly unrelated to the subject matter of the notice. The question, therefore, is what restriction *did* Congress intend? The answer to that, we submit, is indicated by the context in which Congress used the phrase. Section 2 Seventh provides that no carrier "shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed . . . in Section 6," and Section 6 then prescribes the procedure by which changes in such rates of pay, rules, or working conditions may be effected. Accordingly, the phrase "rates of pay, rules, or working conditions," as used in the second sen-

tence of Section 6, should be read to mean what it means in Section 2 Seventh and the first sentence of Section 6—*i.e.*, rates of pay, rules, or working conditions that are fixed by the parties' agreements. That is what *Williams* held. See pp. 7-8, *supra*. Indeed, that construction of Section 6 was supported by virtually all relevant precedent until the decisions below in this case. See pp. 7-16, *supra*.¹¹

5. As we said at the outset, there is no more important question before the courts today, with respect to railroad labor relations, than is presented by this case. That is demonstrated, we submit, by the substantial volume of recent litigation with respect to the issue, which we have cited above. See pp. 9-14, *supra*. The decision below will have far-reaching adverse effects on both railroad operations and collective bargaining.

It requires little imagination to appreciate the adverse effect on railroad operations if it should become the law, as the Sixth Circuit held in this case, that simply by serving a notice proposing the restriction of a carrier's rights under existing agreements a union can abrogate those rights for as long as it takes the parties to exhaust statutory procedures that are "purposely long and drawn out." *Railway Clerks v. Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966). To take a single example from many that might be cited, in *Transportation-Communication Employees Union v. Illinois Central R. Co.*, p. 13, *supra*, pp. 60a-63a, *infra*, a railroad installed expensive computerized communications equipment that would greatly enhance its ability to serve the public efficiently and safely. The Telegraphers served the railroad with a notice proposing an agreement regulating the use of the equipment. The Telegraphers then sought an injunction, claiming that the status quo provision of Section 6 precluded the railroad from discontinuing older methods of communi-

¹¹ See also Kroner, *Interim Injunctive Relief Under the Railway Labor Act*, 18 N.Y.U. Conference on Labor 179, 190.

cation and using the new equipment while the union proposal was pending. The court that decided the instant case apparently would have granted such an injunction. Yet it is generally accepted that in order to meet the nation's transportation needs, the railroad industry must do far more than it has to modernize its equipment and automate operations. See *Ex Parte No. 256, Increased Freight Rates*, 329 I.C.C. 854, 873-874 (1967). The decision below will interfere with that process. It will discourage operational changes intended to promote efficiency and safety.

Moreover, the decision below will have a stultifying effect on collective bargaining, because of the nature of the demands and claims it will encourage. The decision would permit a union, simply by serving a Section 6 notice, to obliterate rights under existing agreements and obtain unilaterally what the union may not even hope to obtain through bargaining. That is wholly inconsistent with the principal purpose of the "major" dispute procedures of the Railway Labor Act, to "avoid any interruption to commerce or to the operation of any carrier engaged therein" by requiring carriers and unions alike "to exert every reasonable effort to make and maintain agreements" (45 U.S.C. §§ 151a(1), 152 First). As this Court itself has observed, the "processes of bargaining and mediation" called for by the Act would "become a sham" if a party "could unilaterally achieve what the Act requires be done by the other orderly procedures." *Railway Clerks v. Florida E. C. R. Co.*, *supra*, 384 U.S., at 247 (1966).

The dispute in *Telegraphers v. Chicago & N. W. R. Co.*, 362 U.S. 330 (1960), can be used to illustrate the point. In that case this Court upheld a Section 6 notice proposing an agreement that "[n]o position in existence on December 3, 1957, will be abolished or discontinued except by agreement" 362 U.S., at 332. In July 1960, after this Court's

decision, bargaining was resumed. Two years later, in July 1962, the parties exhausted the "major" dispute procedures, and the Telegraphers called a strike. Two months later an agreement was reached. Emergency Board No. 147, appointed by the President to investigate the dispute pursuant to Section 10 of the Railway Labor Act (45 U.S.C. § 160), did not recommend the "job freeze" requested by the Telegraphers (see Report of Emergency Board No. 147), and the parties' agreement did not give the Telegraphers such a "freeze". Yet, under the decision below, the Telegraphers would have had the "job freeze" requested in their notice by operation of law throughout the extended period of the negotiations, a period during which the railroad eliminated a substantial number of unneeded positions pursuant to the existing collective agreement. See Report of Emergency Board No. 147, p. 17. That result would have been particularly incongruous in view of the fact that the Telegraphers indicated in their brief in this Court that bargaining might modify their demands (see Petr. Br., No. 100, O.T. 1959, pp. 41-42), and their counsel testified during hearings involving this Court's decision that "as everyone knows, a proposal under the Railway Labor Act is *the starting point, not the end of* collective bargaining." *Hearings on S. 3548 before the Special Subcommittee of the Senate Judiciary Committee*, 86th Cong., 2d Sess., June 28, 1960, p. 186 (emphasis added).

We respectfully submit that this case warrants review by this Court.

Conclusion

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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Railway Labor Act Excerpts

APPENDIX A

Railway Labor Act

(45 U.S.C. § 151, et seq.)
(Excerpts)

General Purposes

Section 2 (45 U.S.C. § 151a). The purposes of the Act are: (1) To avoid any interruption in commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any other, as a condition of employment or otherwise of the part of employees in joining labor organizations; (3) to provide for the independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

General Duties

Section 2 First (45 U.S.C. § 152 First). It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption in commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2 Seventh (45 U.S.C. § 152 Seventh). No carrier, its officers, or agents shall change the rates of pay, rules,

APPENDICES

*Railway Labor Act Excerpts***APPENDIX A****Railway Labor Act**

(45 U.S.C. § 151, *et seq.*)
(Excerpts)

GENERAL PURPOSES

SECTION 2 (45 U.S.C. § 151a). The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

SECTION 2 First (45 U.S.C. § 152 First). It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof .

• • • • •

SECTION 2 Seventh (45 U.S.C. § 152 Seventh). No carrier, its officers, or agents shall change the rates of pay, rules,

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or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.

• • • • •

SECTION 3 (45 U.S.C. § 153). First. There is hereby established, a Board to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

• • • • •

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

• • • • •

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

• • • • •

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers

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and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of

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the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon the award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

• • • • •

SECTION 5 (45 U.S.C. § 155). First. The parties, or either

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party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

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SECTION 6 (45 U.S.C. § 156). Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes

Railway Labor Act Excerpts

shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

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SECTION 10 (45 U.S.C. § 160). If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board

Railway Labor Act Excerpts

shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

*Opinion of Court of Appeals***APPENDIX B****Opinion of Court of Appeals**

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Decided October 7, 1968.

Before: McCREE and COMBS, Circuit Judges, and CECIL, Senior Circuit Judge.

COMBS, Circuit Judge. The Detroit and Toledo Shore Line Railroad [Shore Line] brought suit to enjoin a threatened strike by the Brotherhood of Locomotive Firemen and Enginemen [BLF&E]. The BLF&E counterclaimed, seeking to enjoin a change in work assignments proposed by Shore Line. The District Court dismissed Shore Line's complaint and issued the injunction sought by BLF&E, 267 F.Supp. 572 (1967). This appeal followed.

Shore Line's main line of railroad runs from Toledo, Ohio to Detroit, Michigan. Until 1961, all work assignments for Shore Line's crews started and ended at Lang Yard in Toledo. An increasing volume of business in Trenton, Michigan caused Shore Line to consider the establishment of a terminal there. A major difficulty in this regard stemmed from the fact that all of its work assignments for many years had originated at Lang Yard, thirty-three miles away. Thus, to service a train starting and ending its run in Trenton, it was necessary to transport the work crews to and from Lang Yard each day.

In 1961, Shore Line notified three unions representing its employees, including BLF&E, that certain designated work assignments would henceforth originate in Trenton. The unions served notice on Shore Line, pursuant to Section 6 of the Railway Labor Act, proposing certain special working conditions for employees who would operate out of Trenton. Conferences on these notices brought no agreement and the matter was referred to the National Mediation Board. While the case was pending before the Board, Shore Line established two new work assignments to origi-

Opinion of Court of Appeals

nate in Dearoad, Michigan, eleven miles north of Trenton. The crews operating out of Dearoad were driven to Trenton by a taxicab service operated by Shore Line.

When the Dearoad work assignments were announced, the BLF&E withdrew from the Mediation Board proceedings and, before a Special Board of Adjustment, challenged Shore Line's right to establish the new work assignments.¹ It was asserted that these assignments were contrary to the collective bargaining agreement between the parties. On November 30, 1965, the Special Board ruled that the Shore Line-BLF&E bargaining agreement did not prohibit the establishment of outlying work assignments.

Shortly after the action by the Special Board, Shore Line revived its plan to originate work assignments out of Trenton. Learning this, BLF&E served a Section 6 notice on Shore Line, proposing an amendment to the existing collective bargaining agreement to the effect that "all road service runs and/or assignments will originate and terminate at Lang Yard. . . ." The parties, being unable to agree, submitted the matter to the National Mediation Board. Notwithstanding this action, Shore Line posted notices announcing two work assignments to originate at Trenton. The BLF&E threatened to strike and this action was initiated.

The District Court enjoined Shore Line from "establishing or operating a terminal point at Edison Station, Trenton, Michigan, or any other terminal point not previously established. . . ." The injunction was grounded on the Section 6 requirement that, following issuance of a notice under that section or the National Mediation Board's proffer of services, a carrier may not alter "rates of pay, rules, or working conditions" until Section 6 procedures have been exhausted.

Shore Line asserts that the District Court's decision is

¹ The BLF&E decided to treat the controversy as a "minor dispute." Under Section 3 of the Railway Labor Act, such disputes are settled by an Adjustment Board whose interpretation of the contract is binding on the parties. See *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945).

Opinion of Court of Appeals

erroneous for two reasons. First, it is contended that the status quo provision in Section 6 of the Act applies only to changes in "rates of pay, rules, or working conditions" which are embodied in the bargaining agreement, and that no terminal point is established in the bargaining agreement. We find this argument to be lacking in merit for the reasons stated in the opinion of the District Judge.

Second, it is argued by Shore Line that the establishment of a railway terminal is not bargainable because it is a managerial prerogative. This argument would have great force if the District Court's judgment prevented the company from constructing physical facilities known as a "terminal" or from using such facilities as a terminal. But such is not the case. The controversy here is focused on where work assignments will commence and end—the place where employees will report on and off duty. We find nothing in the correspondence between the parties, in the testimony of the witnesses, or in the opinion of the District Judge which would indicate that the judgment of the District Court should be given a broader meaning.

The question before the District Court was whether the place where employees for many years have originated and terminated their work days is a "working condition" which can be changed unilaterally by the employer without exhausting the bargaining procedures required by Section 6 of the Act. We note that it is stated by the District Judge in his opinion: "The proposed rule actually seeks to establish that all crewmen will report to duty at Lang Yard and not 35 miles north of Toledo."

It was held by the District Judge that this is a proper subject for bargaining and, as we construe the judgment, that is all that was held. We agree with the reasoning of the District Judge and with his conclusion.

Judgment affirmed.

*Opinion of District Court***APPENDIX C****Opinion of District Court on Motion to Vacate Judgment***

(Filed May 12, 1967)

YOUNG, J.:

This cause arises under various provisions of the Railway Labor Act. 45 U.S.C. §§ 151 et. seq. Plaintiff sued the Brotherhood of Railroad Trainmen (hereinafter referred to as the Trainmen), the Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as the Firemen), and their respective officers for an order restraining them from striking. The Firemen counterclaimed for an injunction to prevent the plaintiff from violating the status quo provisions of the Act by unilaterally establishing a new terminal point, thereby changing the place where the employees would be required to go on and off duty. The action came on to be heard on October 7, 1966, and testimony and argument were heard at that time. This Court rendered an oral decision in which it refused to grant the injunction against the Unions, while finding for the Firemen on their counterclaim. On November 1, 1966, the findings of fact and conclusions of law of the Court were filed. Plaintiff has now moved for an order vacating the judgment with respect to the Firemen, and for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure.

Since rather complete findings of fact have already been made, only a short summary of the facts will be repeated here. For many years Lang Yard in Toledo, Ohio has been the terminal point for train and engine crews going on and off duty, and from which switching services for the Monsanto Chemical plant at Trenton, Michigan was performed. On February 21, 1961 the railroad notified both unions of its intention to establish a new terminal point at Edison Station in Trenton, Michigan. The unions thereafter joined in seeking an amendment of the collective bar-

* Reported at 267 F. Supp. 572.

Opinion of District Court

gaining agreements to cover the changed working conditions pursuant to 45 U.S.C. § 156 by giving what is known as a section 6 notice. The services of the National Mediation Board were invoked but the parties failed to reach an agreement and declined arbitration. It is agreed that at this point the procedures with respect to the handling of the section 6 notice had been exhausted, and both the unions and the company were free to resort to self-help. Thereafter, certain other steps were taken by the Company and the Trainmen but this Court found that these related to the same basic dispute. This being the case, it was the Court's ruling that the dispute was a "major dispute" and that the Court therefore had no jurisdiction to enter an injunction against a strike by the Trainmen because of the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq. That determination is not an issue here since the plaintiff has asked for an order vacating the judgment only with respect to the Firemen.

The facts particularly relevant to the present motion are that on January 27, 1966, the Firemen served a new section 6 notice on the plaintiff and that this time instead of seeking amendments to the bargaining agreement to cover the changed working conditions caused by the establishment of the new terminal point, sought to amend the agreement to establish Lang Yard as the sole terminal point for plaintiff's operations. The services of the National Mediation Board were again invoked and as of the date of the hearing, the matter was awaiting assignment of a mediator.

On September 19, 1966, plaintiff posted a bulletin advising the employees that Edison Station would be the new terminal point. This would mean that the employees would go on and off duty in Trenton, Michigan, some 30 to 40 miles north of Toledo where they had previously been based.

It was the holding of this Court that the unilateral action by the Company in posting the bulletin changing the terminal point after the services of the Mediation Board had been requested, violated the status quo provisions of sections 5 and 6 of the Act, providing that working condi-

Opinion of District Court

tions shall not be altered by the carrier until the controversy has been finally acted upon by the Board and for 30 days thereafter. The plaintiff's petition was therefore denied with respect to the Firemen, and plaintiff was enjoined from operating a terminal point at Edison Station until the exhaustion of the procedures of the Act. It is this holding which is disputed by the present motion.

It is unnecessary in this case to discuss in detail the "major" and "minor" dispute dichotomy in the Railway Labor Act. Suffice to say that if the dispute is termed major, either party may initiate the procedures of the Act by the service of a notice to change the contract pursuant to Section 6.¹ If settlement cannot be reached in conference, the matter is referred to mediation under the auspices of the National Mediation Board. 45 U.S.C. § 155 (1964). The procedure for handling major disputes is designed to assist the parties in reaching agreement, and there is no authority to decide the dispute for the parties unless they agree to submit to arbitration.

After the parties have exhausted the procedures of the Act, they are free to resort to self-help and the courts may not enjoin a strike by the union nor a unilateral change in rates of pay, rules and working conditions by the carrier. *Brotherhood of Locomotive Engineers v. Baltimore & O.R.R.*, 372 U.S. 284 (1963); *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960). However, pending exhaustion of such machinery, the parties are required to maintain the status quo. Thus, while the parties are in the process of exhausting the proceedings described above, the railroad may not unilaterally change the rates of pay, rules or working conditions and a court may enjoin such action. 45 U.S.C. §§ 155, 156 (1964); *United Industrial Workers of Seafarers v. Board of Trustees*, 368 F.2d 412 (5th Cir. 1966).

Plaintiff argues that the present controversy is neither a major nor a minor dispute but rather that it involves a matter of management prerogative.

¹ 45 U.S.C. § 156 (1965).

Opinion of District Court

For the procedures of the Railway Labor Act to be applicable there must first be a "labor dispute." Thus, for example, if management decided to install new machinery which did not in any way affect the terms or conditions of employment nor violate the collective bargaining agreement, it could do so without prior consultation with the union. If the union takes strike action concerning a non-bargainable matter, a court may issue a strike injunction because the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, preventing injunctions in "labor disputes" is not applicable. See *Chicago & N.W. Ry. v. Order of R.R. Telegraphers*, 264 F.2d 254, 260 (7th Cir. 1959), *rev'd on other grounds*, 362 U.S. 330 (1960).

The Supreme Court case of *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960) involved facts which were substantially similar to the case at bar. In that case the railroad filed petitions with the public utility commissions in several of the states in which it operated asking permission to eliminate certain of its railroad stations. Recognizing that the plan would result in a loss of jobs, the union gave a Section 6 notice to amend the bargaining agreement to state that no position could be abolished or discontinued except by agreement between the carrier and the organization. The Court held that the case grew out of a "labor dispute" and that by reason of the Norris-LaGuardia Act, the district court was without authority to enjoin the strike.

The Norris-LaGuardia Act defines a labor dispute as follows:

"any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment. . . ."²

The Court said that the controversy clearly involved an effort to change the terms of an existing agreement, and

² 29 U.S.C. § 113(c).

Opinion of District Court

that that term related to a condition of employment. Furthermore, the trend has been to broaden, not narrow the scope of subjects about which workers and railroads may bargain collectively. The Court finally noted that it is "too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees. . . ."³

Plaintiff attempts to distinguish the *Railroad Telegraphers* case by pointing out that the union there only objected to the abolition of jobs, and did not seek a veto over the carrier's right to determine the location of stations, while in the present case the Firemen seek to amend the agreement to make Lang Yard in Toledo the sole terminal point. The proposed rule actually seeks to establish that all crewmen will report to duty and go off duty at Lang Yard and not 35 miles north of Toledo. Certainly this is a proper subject for bargaining. The controversy concerns the terms of a proposed change in the collective bargaining agreement, and those terms relate to a condition of employment.

Plaintiff argues that *Brotherhood of R. R. Trainmen v. New York Cent. R. R.*, 246 F.2d 114 (6th Cir.) cert. denied, 355 U.S. 877 (1957) is controlling in this circuit. This Court believes, however, that that case was overruled by the *Railroad Telegraphers* case, and that the present controversy is a labor dispute not involving a matter solely within the discretion of management.

The second contention of the railroad is that even assuming we are dealing with a labor dispute, and that it is a "major dispute," its own action in establishing a terminal at Trenton prior to the termination of mediation with respect to the Firemen's 1966 notice did not violate the status quo provisions of sections 5 and 6 of the Act. The position of plaintiff is that its contract with the Firemen does not prohibit the establishment of new terminals for road service assignments, and that the status quo requirements of section 6 prohibit only changes in rates of pay, rules, or

³ 362 U.S. 330, 339 (1960).

Opinion of District Court

working conditions fixed by the parties' collective bargaining agreement. In other words, section 6 applies only when the proposed change in the agreement directly conflicts with a provision of the present contract. In support of this contention plaintiff cites a report of the National Mediation Board which reads in part as follows:

"Section 6 states that where notice of intended change in an agreement has been given, rates of pay, rules, and working conditions *as expressed in the agreement* shall not be altered by the carrier until the controversy has been finally acted upon in accordance with specified procedures. Positively stated, section 6 is intended to maintain the contract as it existed between the parties until the provisions of the act have been complied with."⁴ (Emphasis added.)

But the phrase "as expressed in the agreement" does not appear in section 6 of the Act, and this language appears to have been added by the Board. This Court does not think that such a limitation on the application of the status quo requirements is sound. The general scheme of the statute indicates that the purpose of the status quo provision is to aid the National Mediation Board in its function of helping the parties to reach an agreement. If the carrier can unilaterally change the working conditions of its employees while such conditions are the subject of mediation efforts by the Board, the work of the Board would be greatly hampered. Thus, it would appear that whenever the services of the Board have been invoked, its jurisdiction should be protected by the application of the provisions of section 6 even if the particular condition is not fixed by the existing agreement. There is no reason why the status quo provisions should not apply whenever the Board is mediating a dispute.

Furthermore, the limitation which the plaintiff places on the application of the status quo provision is unsupported by case law. In *Williams v. Jacksonville Terminal*, 315

⁴ Thirty-First Annual Report of the National Mediation Board 25 (1965).

Opinion of District Court

U.S. 386 (1942) the Court did state that the prohibitions of section 6 against changes in wages and working conditions pending bargaining are aimed at "preventing changes in conditions previously fixed by collective bargaining agreements."⁵ However, the facts in that case were not even remotely analogous to the present situation, and the legal issues were different. There had been no previous collective bargaining agreement and there was no history of bargaining between the terminal and certain of its employees called "red caps." However, on October 11, 1938 the red caps notified the terminal that they had selected a union to represent them. The union representative then asked for a conference for the purpose of negotiating a collective bargaining agreement. But no section 6 notice was ever given because there was no existing agreement to amend. The carrier thereafter delivered to each red cap a letter stating that his weekly wage in the future would be the difference between the minimum wage set by the newly enacted Fair Labor Standards Act and the amount of tips received by him each week. An agreement was subsequently reached with regard to working conditions and hours but it omitted any reference to wages. The union representative then sued the terminal for wages due to the red caps under the Fair Labor Standards Act. The union contended among other things that the railroad could not apply the tips to the minimum wage figure because to do so violated the status quo provisions of the Railway Labor Act. The Court held that section 6 did not apply. This result is quite logical because section 6 applies only to intended changes in collective bargaining agreements and there was no agreement in existence to change. The decision of the Court, however, is not relevant to the present controversy, because the Firemen and the plaintiff have an agreement in effect and a section 6 notice has been given proposing that it be changed. The Board's services have therefore properly been invoked, and its jurisdiction to mediate should be protected.

⁵ 315 U.S. 386, 402-403 (1942).

Opinion of District Court

The case of *Norfolk & Portsmouth Belt Line R.R. v. Brotherhood of R.R. Trainmen*, 248 F.2d 34 (4th Cir.) cert. denied, 355 U.S. 914 (1957), is also not in point. The Court used language which supports plaintiff's contention but it is dictum, since the final determination was that the controversy was a minor dispute.

Thus, the language which the Board read into the Act in its report cited above is supported neither by sound reasoning nor by case law. Therefore, this Court will not limit the application of the status quo provisions which are clearly set forth in section 6.

The plaintiff's motion for an order vacating the judgment of this Court entered on November 16, 1966 and for a new trial will therefore be denied.

DON J. YOUNG,
United States District Judge.

Toledo, Ohio.

*Oral Decision of District Court***APPENDIX D****Oral Decision of District Court**

(October 7, 1966)

Young, J.

[2] Gentlemen, I have been considering this matter, the arguments of counsel as well as the various authorities that have been cited, and those citations I have explored for myself. The Court has come to some conclusions which I think should be dispositive of the matter.

Actually, we have two separate cases here before us. This was pointed out in argument and is emphasized by the fact that there are two separate Answers filed. One of the Answers has with it a Counterclaim or Cross-Petition.

So that I am going to consider my disposition of the case as involving two separate matters which will require separate disposition.

The first of the two matters is the Complaint with respect to the actions of the Brotherhood of Railroad Trainmen; at least that is the one that I am going to consider first.

[3] The problem there, of course, is raised by the prayer of the Complaint for an Injunction restraining the Brotherhood from an alleged threat to strike over a dispute that was precipitated by a bulletin posted by the plaintiff on September 19th of this year providing that certain work assignments were going to have their terminal at the Edison Yard at Trenton, Michigan.

While there are apparently some differences between these two locations, it is too trivial to give any consideration to.

The problem here is simply another facet, it seems to the Court, of a long-standing dispute that has occurred between the parties, starting way back in 1961, or perhaps even before that.

It is argued that the 1961 matter is all over and done with and that the current dispute is an entirely new one.

Oral Decision of District Court

It is difficult for me to accept that interpretation of the facts that are on the record in this case.

The problem here, as the Court sees it, is that the plaintiff's claimed right to establish terminals wherever it wants to establish them leaves gaps in the agreements between the plaintiff and the defendant Brotherhood, because the agreement actually only sets up rates of pay and working [4] conditions for operations out of one main terminal.

So that we have, in effect, a situation where there is no agreement between the parties which could determine the difficulties between them.

When we come to consider that dispute in the light of the applicable law, we run into the difficulty that on such matters—that is, matters where there is no agreement between the parties and an agreement has to be negotiated—the Norris-LaGuardia Act and the Railway Labor Act do not seem to contemplate that the Court only has jurisdiction to interfere with other procedures used to resolve those difficulties.

Sometimes the language is used “major disputes and minor disputes,” and while the Court may intervene in minor disputes to see that the provisions of the law are carried out, the Court may not intervene when there is a major dispute between the parties. That appears clearly to me to be the situation here, that there is, and for a long time there has been a major dispute between these parties.

The dispute has flared up and been in abeyance from time to time, depending on the actions that were taken by the parties on one side or the other to exacerbate the underlying difficulties, but it never has been resolved in the [5] way disputes are supposed to be resolved by the parties' rights under the law to self-help, and this Court has come to the conclusion that that being the case here, it has no jurisdiction to grant the relief prayed for in the plaintiff's Complaint.

Insofar as the Complaint involves a dispute with the Trainmen, it will be dismissed.

The situation with respect to the Complaint against the Brotherhood of Firemen and Enginemen presents a considerably different situation, a different problem.

Oral Decision of District Court

I was unable to find from the evidence before me that the Brotherhood of Firemen and Enginemen had made any threat to strike. What they had done, apparently some time ago, in the spring of this year, was to make a so-called Section VI complaint to the National Mediation Board. That was duly docketed and a number was assigned to it; as I recall, it was numbered A7839. That matter is now pending the appointment of a mediator.

Under those circumstances, I don't see how a court could have any jurisdiction to grant relief to the plaintiff on their Complaint for an Injunction.

In the first place, if the processes of the law have not [6] yet been exhausted, there would be considerable doubt of the Court's jurisdiction. In the second place, if there really isn't any threat, then there is nothing for the Court to enjoin.

So that, again, as to the plaintiff's Complaint against the Brotherhood of Firemen and Enginemen, the Court is constrained to the view that the Complaint must be dismissed.

However, that does not dispose of all the issues that are raised in that matter, because the Brotherhood, in addition to its Answer which seeks the dismissal of the Complaint, has filed a Counterclaim seeking positive relief against the railroad on their behalf.

Their contention is that, having commenced proceedings under the Railway Labor Act, the provisions of the Act require that the matter should remain in status quo until all those procedures have been terminated, and for thirty days thereafter neither party has the right: (a) the railroad to change wages or working conditions, or (b) the union to strike.

The railroad's contention, the plaintiff's contention, in response to that is that this particular matter, that of establishing a terminal at Trenton or the Edison Yard, is [7] not a condition of employment in which the law requires that the status quo be maintained.

There doesn't appear to be any case law that precisely covers that situation, certainly not as applying to the facts in this case.

Oral Decision of District Court

The plaintiff relies upon a statement in the report of the Labor Board about the matter, but that statement, when taken in context, is based on reading language into the statute which does not appear in the words of the statute itself.

So that this Court apparently has got to take a pioneering position and establish a rule; whether it be a precedent or whether it will stand, there is no way of telling.

But it seems to me that when we look at this thing as a whole and examine the history of it, as shown by the evidence in the record, the question of establishing this terminal at Trenton—while it is arguable, and might even be said to be conceded that the plaintiff had a right to establish terminals wherever it wants to—yet again, when we go back to the contract there isn't anything providing for the working conditions and rates of pay and things of that nature at those other terminals.

[8] So the Court has come to the conclusion that if it were to hold that the plaintiff had a right to go ahead and start doing the things that it proposed in its Bulletin of September 19, 1966 to do, that both as a legal and as a practical matter it would be changing the conditions of employment, because some men would have to be working out of that Yard. They would have to get there the best way they could, or they would have to move from where they now live if they didn't want to commute 35 miles or so back and forth. Certainly where a man lives when he goes to work is one of the conditions of his employment, and, it seems to me, a rather major condition of employment.

So that I feel constrained to grant to the Brotherhood of Firemen and Enginemen the relief that they seek in their Counterclaim, that is that until the processes which are established by statute for working out the dispute between them and the plaintiff have been completed that there should be no change in the practices and the conditions that for many, many, many years have governed the carrier's operation and the work of the members of the defendant unions under it.

I feel that the Court has no alternative except to grant

Oral Decision of District Court

[9] to the defendants the relief that they are seeking by their Counterclaim.

It appearing that the defendants are the prevailing parties under the disposition I have just expressed, I will require that the defendants draft Findings of Fact and Conclusions of Law which are expressive of the Findings and Conclusions so delivered orally by the Court. They should submit those within ten days to the plaintiff. The plaintiff may then have an additional ten days to offer, if they desire, their version of what they believe are proper Findings of Fact and Conclusions of Law.

Upon receiving the Conclusions of both parties, or if the plaintiff accepts those submitted by the defendants, upon receiving the Conclusions expressed by the defendants, the Court will then enter an Order upon the Findings and Conclusions.

Judgment of Court of Appeals

APPENDIX E

Judgment of Court of Appeals

(Filed October 7, 1968)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18,059

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,
Plaintiff-Appellant,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
ET AL., Defendants-Appellees.

BEFORE: MCCREE and COMBS, Circuit Judges and CECIL,
Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

*Findings of Fact and Conclusions of Law***APPENDIX F****Findings of Fact, Conclusions of Law, and
Judgment of District Court**

(Filed November 1, 1966)

Pursuant to Rule 52(a), the court hereby enters the following findings of fact and conclusions of law which constitute the grounds for its previously announced decision herein.

Findings of Fact

1. Plaintiff is a Michigan corporation with its principal office in Detroit, Michigan, and is a common carrier by railroad engaging in interstate commerce. Plaintiff operates its trains over its line of railroad between Lang Yard in Toledo, Ohio, and Detroit, Michigan, and over the lines of other railroads to other points in the State of Michigan.
2. Defendant Brotherhood of Locomotive Firemen and Enginemen (sometimes hereinafter referred to as the "Firemen") is a voluntary unincorporated association and labor organization, and is the only authorized representative, for purposes of collective bargaining under the Railway Labor Act, of the crafts or classes of railway engineers, firemen and hostlers employed by plaintiff; defendant H. E. Gilbert is President of the Firemen; and defendant E. F. Gensler is General Chairman of the Firemen on the property of plaintiff railroad.
3. Defendant Brotherhood of Railroad Trainmen (sometimes hereinafter referred to as the "Trainmen") is a voluntary unincorporated association and labor organization, and is the only authorized representative, for purposes of collective bargaining under the Railway Labor Act, of the crafts or classes of trainmen and yardmen employed by plaintiff; defendant Charles Luna is President of the Trainmen; and defendant William Upham is General Chairman of the Trainmen on the property of plaintiff railroad.
4. At all times material hereto each of said Brotherhood

Findings of Fact and Conclusions of Law

defendants has been a party to separate collective bargaining agreements with plaintiff governing rates of pay, rules and working conditions of the separate crafts or classes of employees represented as aforesaid.

5. For many years prior to 1961, Lang Yard in Toledo, Ohio, was the terminal point, for train and engine crews going on and off duty, from which plaintiff operated to perform switching service for the Monsanto Chemical Company plant at Trenton, Michigan, where no terminal point had previously been established or operated by plaintiff. Under date of February 21, 1961, plaintiff advised defendant Brotherhoods of its intention to establish such a terminal point at Edison Station, in Trenton, Michigan, and inquired as to the facilities that would be required for employees going on and off duty at that point.

6. Under date of April 28, 1961, defendant Brotherhoods joined in serving on plaintiff, pursuant to Section 6 of the Railway Labor Act, a notice seeking amendment of existing collective bargaining agreements so as to cover changed working conditions of employees affected by the proposed establishment of a new terminal point. This notice was implemented by written proposals for specific benefits for such employees served on plaintiff under date of June 8, 1961.

7. Negotiations on said notice and proposals, and mediation thereon under the auspices of the National Mediation Board, failed to result in any agreement of the parties, and under date of January 1, 1963, said Board advised the parties, including plaintiff, of the failure of its mediatory efforts, and in accordance with Section 5, First, of the Railway Labor Act, requested the parties to submit the controversy to arbitration. All parties having declined arbitration, said Board, under date of March 4, 1963, notified the parties that, except as provided in Section 5, Third, and in Section 10 of the Act, the Board's services had that day been terminated. On April 3, 1963, said Board notified the parties of the closing of its file in the matter, which it had docketed as National Mediation Board Case No. A-6755. At the hearing herein, it was conceded by plaintiff that at that stage all of the provisions of the Railway Labor Act

Findings of Fact and Conclusions of Law

governing the handling and processing of the major dispute initiated by defendants' Section 6 notice of April 28, 1961, had been exhausted, and that employees of plaintiff represented by defendant Brotherhoods were at that time legally free to strike.

8. Plaintiff's rejection of arbitration of said dispute had been coupled with a representation by it that its plans to establish a terminal point at Edison Station, Trenton, Michigan, had been abandoned, and that the dispute was therefore moot; and for some time no further action in connection with such dispute was taken by plaintiff or defendants. On December 16, 1965, a new written proposal for an agreement establishing conditions to be observed in establishment of a terminal point at Trenton (Edison Station) was given plaintiff by the Trainmen, which, though embodying conditions differing in part, at least, from those contained in the June 8, 1961, proposal, related to the same basic major dispute. These proposals were rejected by plaintiff.

9. In the meantime, defendant Firemen had withdrawn their Section 6 notice of April 28, 1961, and invocation of the National Mediation Board's services in connection therewith, and on January 27, 1966, served a new Section 6 notice on plaintiff calling for amendment of the Firemen's collective bargaining agreement so as to establish Lang Yard, Toledo, Ohio, as the sole terminal point for plaintiff's operations. Negotiations on that proposal failed to result in agreement, and under date of June 17, 1966, the Firemen formally invoked the services of the National Mediation Board in connection therewith. Under date of June 28, 1966, plaintiff and the Firemen were advised by said Board that the dispute had been docketed as National Mediation Board Case No. A-7839, and as of the date of the hearing herein said matter was awaiting assignment of a mediator by the Board.

10. Under date of September 19, 1966, plaintiff posted a bulletin directed to its employees advising of the establishment of a new train assignment, to operate out of Edison Station, Trenton, Michigan, as its terminal point, to be effective September 26, 1966. On September 23, 1966, plain-

Findings of Fact and Conclusions of Law

tiff submitted to the National Railroad Adjustment Board a purported dispute with the Trainmen as to plaintiff's right, under its agreement with the Trainmen, to unilaterally establish new terminal points. On the same day this suit was filed, seeking an injunction against an alleged threatened strike by both defendant Brotherhoods.

11. At the hearing herein plaintiff conceded that the case involves separate causes of action, based on completely different relevant facts, against the Trainmen defendants and the Firemen defendants. Each group of defendants filed separate answers, and that of the Firemen incorporated a counterclaim against plaintiff seeking to enjoin it from unilaterally establishing the proposed terminal point at Trenton pending exhaustion of the procedures of the Railway Labor Act in connection with the aforementioned dispute currently pending before the National Mediation Board as its Case No. A-7839.

Conclusions of Law

1. Plaintiff invokes the jurisdiction of this Court under the Judicial Code (28 U.S.C., Secs. 1331 and 1337), the Interstate Commerce Act (49 U.S.C., Secs. 1 et seq.), and the Railway Labor Act (45 U.S.C., Secs. 151 et seq.).

2. Plaintiff is a common carrier by railroad in interstate commerce, and is subject to the provisions of the Railway Labor Act.

3. As to both the Firemen and the Trainmen defendants, their respective disputes with plaintiff, though separate and distinct, are primarily concerned with the amendment of existing collective bargaining agreements, and as such are "major disputes" subject to handling in accordance with the provisions of Section 6 and Section 5 of the Railway Labor Act. (*Elgin, Joliet and Eastern R. Co. v. Burley*, 325 U.S. 711.)

4. Under said Act, after exhaustion of the machinery provided for the handling of such disputes, without agreement being reached, both parties become legally free to resort to self help, including the right of employees to strike and the right of the carrier to place in effect unilateral changes in rates of pay, rules and working conditions.

Findings of Fact and Conclusions of Law

(*Railroad Telegraphers v. Chicago and North Western Railroad Co.*, 362 U.S. 330; *Brotherhood of Locomotive Engineers v. B. & O. R.R. Co.*, 372 U.S. 284.) Pending exhaustion of such machinery, the "status quo" is to be maintained by both parties. (Railway Labor Act, Sec. 6 and Sec. 5; *Butte, Anaconda & Pac. Ry. Co. v. Brotherhood of L.F. & E.*, 168 F. Supp. 911, aff'd. 268 F. (2d) 54; *Baltimore & Ohio R. Co. v. United Railroad Wkrs., etc.*, 271 F. (2d) 87, 90.)

5. With respect to the Trainmen defendants, the current dispute is over working conditions to be agreed upon in connection with plaintiff's establishment of a new terminal point at Trenton, Michigan, and is the same basic major dispute that was handled through all of the procedures of the Railway Labor Act to the maturing of said defendants' admitted right to strike in 1963. There being no prohibition in said Act against the right of the Trainmen to strike, and the jurisdiction of the court to grant injunctive relief in such circumstances being withdrawn by the provisions of the Norris-LaGuardia Act (29 U.S.C., Sec. 101 et seq.), the Trainmen's right to strike to obtain agreement of plaintiff upon such conditions may not be enjoined. (See *General Committee, B.L.E., v. Missouri-K.T. R. Co.*, 320 U.S. 323, 332-333; *Missouri-Illinois R. Co. v. Order of Railway Conductors*, 322 F. (2d) 793; *Pan American World Air. v. Flight Eng. Intern. Assoc.*, 306 F. (2d) 840; and cases cited above.)

6. Plaintiff's submission to the National Railroad Adjustment Board, coincidentally with the filing of this action, of a purported dispute with the Trainmen over its right to unilaterally establish a new terminal at Trenton, Michigan, by its terms does not deal with the establishment, by contract, of new working conditions at Trenton; and there is no evidence on the record herein to support the existence of any such contract interpretation dispute with the trainmen as that described in plaintiff's submission to said Adjustment Board. The jurisdiction of the National Railroad Adjustment Board does not extend to major disputes, such as that here involved, relating to the amendment of provisions of existing agreements. (*Elgin, Joliet and Eastern*

Findings of Fact and Conclusions of Law

R. Co. v. Burley, supra; General Committee, B.L.E. v. Missouri-K.-T. R. Co., supra.)

7. With respect to plaintiff's cause of action against the Firemen defendants, the court finds that plaintiff, having failed to comply with the *status quo* requirements of Sections 6 and 5 of the Railway Labor Act, with reference to handling of major disputes, is barred by the provisions of the Norris-LaGuardia Act, and particularly Section 8 thereof (29 U.S.C. Sec. 108) from obtaining any injunctive relief.

8. With respect to the counterclaim of the Firemen defendants against plaintiff, the court finds that in instituting Trenton, Michigan, as a new terminal point on September 26, 1966, pursuant to its bulletin of September 19, 1966, plaintiff effected a change in rates of pay, rules and working conditions, and established practices in effect prior to the time the dispute arose, which were the subject of the pending National Mediation Board Case No. A-7839, in violation of the *status quo* provisions of Section 6 and Section 5 First (b) of the Railway Labor Act, and should be enjoined to desist and refrain from such violation pending exhaustion of the major disputes handling procedures of said Act. It is well established that the court has jurisdiction to grant injunctive relief "to compel compliance with positive mandates of the Railway Labor Act". (*Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232, 237.)

9. In view of the foregoing findings and conclusions, an order will be entered dismissing plaintiff's action for injunction against defendants, and, on the Firemen defendants' counterclaim, enjoining and restraining plaintiff from operating a terminal point at Edison Station, Trenton, Michigan, or any other terminal point not previously established, unless and until its pending major dispute with the Firemen, involved in National Mediation Board Case No. A-7839, has been fully handled to a conclusion, and the right of the parties thereto to resort to self-help has been matured, by exhaustion of the procedures of Sections 6 and 5 of the Railway Labor Act, unless said dispute be earlier resolved by agreement between plaintiff and the Firemen.

DON J. YOUNG,
United States District Judge.

*Judgment of District Court***Judgment and Decree**

(Filed November 15, 1966)

This cause came on to be heard on October 6, 1966, by agreement of the parties, on the merits of plaintiff's complaint for injunction, the answer of defendants, and the counterclaim of defendants Brotherhood of Locomotive Firemen and Enginemen, H. E. Gilbert and E. F. Gensler for an injunction against plaintiff, and having been tried before the Court, argued by counsel, and considered by the Court, and the court having announced its opinion and having entered its findings of fact and conclusions of law in accordance therewith, now, therefore, it is ordered, adjudged and decreed that plaintiff shall not have any relief in this action, and that the same shall be and hereby is dismissed on the merits as to all defendants.

It is further ordered, adjudged and decreed that the counterclaim of said defendants Brotherhood of Locomotive Firemen and Enginemen, H. E. Gilbert and E. F. Gensler should be and hereby is sustained, and that plaintiff, its employees, agents or representatives, and anyone acting by, through or for it, or on its behalf, be and they hereby are enjoined and restrained from establishing or operating a terminal point at Edison Station, Trenton, Michigan, or any other terminal point not previously established, unless and until its pending major dispute with said Brotherhood of Locomotive Firemen and Enginemen, involved in National Mediation Board Case No. A-7839, has been fully handled to a conclusion, and the right of the parties thereto to resort to self-help has been matured, by exhaustion of the procedures of Sections 6 and 5 of the Railway Labor Act, unless said dispute be earlier resolved by agreement between plaintiff and said Brotherhood.

DON J. YOUNG,
United States District Judge.

Award of SBA No. 375

APPENDIX G

Award of Special Board of Adjustment No. 375

(November 30, 1965)

Parties To Dispute:

The Brotherhood of Locomotive Firemen and Enginemen.
The Detroit and Toledo Shore Line Railroad Company.

Statement of Claim:

"Formal protest of Bulletin No. 1192, dated September 24, 1963, wherein the Carrier advertises a Work Train to operate out of Dearoad, contrary to agreement and all practices of the past.

"In connection therewith, also accept this as a Committee claim on behalf of all enginemen for any loss sustained thereunder, should the aforementioned bulletin be placed in effect."

Findings:

What took place here was not a change in the recognized terminal, but simply amounted to an outlying assignment. There is nothing in the rules of agreement which precludes this carrier from establishing an outside assignment.

The employees laid particular stress on their Exhibit 8, but close examination of same does not indicate to the majority that the Carrier limited itself with respect to establishing outside assignments. Said Exhibit 8 reflects that a limited agreement between the parties to set-up a five-day assignment at a date prior to the five-day work week was effectuated.

Award of SBA No. 375

Award:

The claim is denied.

DAVID R. DOUGLAS, *Neutral Member*

C. J. McPHAIL,
Carrier Member

D. C. DEERING,
Employee Member
(I dissent)

Detroit, Michigan—November 30, 1965

National Mediation Board Instructions

APPENDIX H

**National Mediation Board
Instructions to Mediators**

May 12, 1960.

TO: ALL MEDIATORS

FROM: E. C. Thompson, Executive Secretary

Section 6 of the Railway Labor Act states:

“In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.”

The Board's policy in regard to the “status quo” provision quoted above is outlined in the following letters:

“August 17, 1956

“File No. C-2511

“Mr. T. C. Carroll, President
Brotherhood of Maintenance of Way Employees
12050 Woodward Avenue
Detroit 3, Michigan

Dear Mr. Carroll:

“Reference is made to your letter of August 10, 1956, in connection with our File C-2511 which covers your application for mediation dated July 27, 1956 in connection with a dispute between your organization and the Atchison,

National Mediation Board Instructions

Topeka & Santa Fe Railway Company, Panhandle & Santa Fe Railway Co. and Gulf, Colorado & Santa Fe Railway Co. which you described on your application as follows:

“ ‘Failure of management to maintain status quo with respect to territorial limits and assignments currently in effect, and to dispose of our Formal Notice dated April 23, 1956, without undue delay.’ ”

“The Board considered your letter of August 10, 1956 in Executive Session on August 16, 1956. The Carrier has taken the position that the proposed rearrangement of sections and the consequent changes in forces are permissible under the present agreement, and if a dispute exists as to the application of the present rules it should be taken before the National Railroad Adjustment Board.

“The National Mediation Board does not understand Section 6 of the Railway Labor Act to mean that proposed revisions of agreement rules and the invocation of this Board's services on such proposed changes has the effect of staying the application of existing rules unless and until such existing rules are amended or revised.

“In view of the language of Section 2, Seventh of the Railway Labor Act stating ‘No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this act.’, the Board fails to find any basis for complying with your request.

“The Board does feel, however, that the carriers should not unduly delay completion of negotiations on the changes requested in your General Chairman's letter of April 23, 1956, and urges the carriers to arrange to meet your representatives and complete negotiations at the earliest practicable date.

National Mediation Board Instructions

"Copy of your letter of August 10, 1956 is being sent herewith to Messrs. Tucker, Buchanan and Olson of the carriers with copy of this letter.

"By direction of the NATIONAL MEDIATION BOARD.

"s/ E. C. THOMPSON
Executive Secretary"

"June 19, 1957

"A-5498

"Mr. C. R. Tucker, Vice President Operations
Atchison, Topeka and Santa Fe Railway
80 East Jackson Blvd.
Chicago 4, Illinois

"Mr. Geo. M. Harrison, Grand President
Brotherhood of Railway & Steamship Clerks
1055 Vine Street
Cincinnati 2, Ohio

Gentlemen :

"Reference is made to application for mediation filed by the Brotherhood of Railway & Steamship Clerks on June 5, 1957 in a dispute between that organization and the Atchison, Topeka and Santa Fe Railway Company described in the application as follows :

'Request of employes that the Carrier enter into an agreement with respect to its transfer of certain work and positions from Los Angeles, California, to Topeka, Kansas, and that such agreement be as set forth in letter dated May 6, 1957, attached hereto and designated "Exhibit A-1" as modified in letter dated May 17, 1957, attached hereto and designated "Exhibit A-2" both of which are made a part hereof.'

"As we understand it this application was intended to cover the proposals made by the General Chairman of the

National Mediation Board Instructions

organization to Mr. W. G. Hunt, General Auditor of the Atchison, Topeka and Santa Fe Railway Company in his letter to Mr. Hunt of May 6, 1957, this letter being superseded by letter from the General Chairman to Mr. Hunt of May 17, 1957.

"The latter letter proposed the negotiation of an agreement between the parties providing certain benefits and protection for employees in the Accounting Department of the Santa Fe at Los Angeles who are proposed to be moved from Los Angeles to Topeka, Kansas. The carrier was advised of this application in our letter of June 7, 1957 and the carrier's reply of June 14, 1957 was received in this office on June 17, 1957. A copy of Mr. Tucker's letter of June 14 to this office is being sent to Mr. Harrison for his information. Mr. Harrison will note from Mr. Tucker's letter that the carrier's position is that the transfer of the employees from Los Angeles to Topeka will be made in accordance with the rules now contained in the current agreement between the parties.

"This application has been considered by the Board and on the basis of the proposal made to General Auditor Hunt in Mr. Byrne's letters of May 6 and May 17, 1957 the Board has directed that Mr. Harrison's application be docketed as Case No. A-5498.

"With reference to the question of maintenance of status quo as mentioned in Mr. Harrison's letter of June 5, 1957, it is not the Board's understanding of Section 6 that an invocation for its services has the effect of staying action under existing rules or renders compliance with existing rules a violation of the Railway Labor Act.

"A mediator will be assigned to commence the handling of this case in Chicago at an early date.

"Very truly yours,

"s/ E. C. THOMPSON
Executive Secretary"

*Award of SBA No. 465***APPENDIX I****Special Board of Adjustment No. 465****PARTIES TO DISPUTE:**

Boston and Maine Corporation and Brotherhood of Railroad Trainmen

Claim T-6709

Award No. 293

STATEMENT OF CLAIM:

Claims of Yard Foreman J. G. Morris, Manchester Yard, for one day's pay, on October 9, 1958 and subsequent dates, account of being displaced off the 9:30 p.m. Manchester Switcher by a man from Nashua Yard who lost his regular assignment because the 5:30 a.m. Nashua Switcher was reduced from three to two men effective October 8, 1958. Claims for all subsequent claimants and subsequent claim dates.

FINDINGS:

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

The Board finds that there is no crew consist rule in yard service on this property. The First Division in Award No. 17886 states that in the absence of a crew consist rule, it is a managerial function to determine the number of men that will be required in a crew complement. The Organization's contention that, due to the fact that a Section 6 notice has been filed by it and the Section 6 notice is now being handled by the National Mediation Board, the

Award of SBA No. 465

serving of the notice operates as a bar to the Carrier's actions which are taken under rules currently in effect is not well founded and has been dealt with by the National Mediation Board when it stated that the serving of a Section 6 notice does not operate as a bar under existing rules. (See report of National Mediation Board for year ending June 30, 1964, page 29).

AWARD

Claims denied.

THOMAS C. BEGLEY,
Chairman

W. J. AHEARNE,
Carrier Member

W. J. WEIL,
Organization Member

Issued at Boston, Massachusetts, this 12th day of September, 1966

*Clerks v. Santa Fe R. Co.***APPENDIX J**

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Plaintiff v. Atchison, Topeka and Santa Fe Railway Company, Defendant. *

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil No. 64-C-669, May 8, 1964

LABUY, D. J.: This matter coming on to be heard on the verified complaint and on the amendment to the complaint and the verified Answer thereto, and the court, having set the matter for hearing, having heard the evidence and considered the briefs submitted by counsel, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiff, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, hereinafter called Clerks, an unincorporated association, is a "representative" within the meaning of § 1, Sixth, 45 U. S. C. § 151, of the Railway Labor Act, 45 U. S. C. §§ 151 et seq. and does business within this judicial district.

2. Defendant, the Atchison, Topeka and Santa Fe Railway Company, hereinafter called Santa Fe, a Kansas corporation with its principal place of business in Topeka, Kansas, is an interstate carrier by rail and a "carrier" within the meaning of § 1, First, of the Railway Labor Act and does business within this judicial district.

3. Clerks represent for purposes of collective bargaining under the Railway Labor Act all employees of Santa Fe in the craft or class of clerks or clerical employees, and

* 50 CCH Lab. Cas. ¶ 19,299.

Clerks v. Santa Fe R. Co.

the current basic collective agreement between Santa Fe and Clerks is contained in a small printed booklet dated November 1, 1963.

4. Collective bargaining agreements in the railroad industry generally do not have fixed expiration dates. They are referred to as "open-end" contracts, and continue in effect until changed. The current agreement between the Clerks and Santa Fe is such an agreement, and Rule 56 thereof expressly provides that it is to continue in effect until changed as therein provided or as provided in the Railway Labor Act.

5. Santa Fe owns in Chicago, Illinois, a freight house designated "Corwith Freight House No. 2" (Corwith) which includes a main building constructed in 1956 and an addition referred to as the "X dock" constructed in 1960.

6. Corwith, including the X dock, is used exclusively for the handling of freight of Republic Carloading and Distributing Company, hereinafter called Republic, a Division of Yale Express System.

7. Republic is a freight forwarder within the meaning of Part IV of the Interstate Commerce Act, 49 U. S. C. §§ 1001 et seq. It consolidates small shipments of its customers into carload quantities and ships by carload over the facilities of Santa Fe and other common carriers. It is one of Santa Fe's best customers.

8. Santa Fe holds itself out through appropriate tariffs filed with the Interstate Commerce Commission to perform loading and unloading services at the request of carload shippers and at the separate rate for such services spelled out in the tariffs. At Santa Fe's Corwith Freight House No. 2, the actual work of consolidating, loading and unloading of freight is performed by Santa Fe employees and Republic is charged on a tariff basis for such handling. This arrangement with Santa Fe has been in existence since November 1956 when Republic consolidated its freight business with the Santa Fe. The choice whether to utilize carrier employees for such service is Republic's.

9. Several months prior to the inception of the instant suit, Republic requested that, because of expansion of its

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business, an addition be constructed at Corwith in the form of an extension to the X dock. It further requested that Santa Fe lease to it the X dock and new addition and advised Santa Fe that upon execution of such lease, it would take over handling of its own loading and unloading work at the X dock and extension. Republic notified Santa Fe that if its proposal were not agreed to it would take its operations out of Corwith.

10. Republic has a collective agreement with the Chicago Truck Drivers, Chauffeurs, and Helpers Union, Independent, which gives members of that union exclusive right to perform Republic's loading and unloading in Chicago when such work is done by Republic employees.

11. After a period of negotiations, Santa Fe and Republic agreed upon the terms of the lease and Republic's taking over its own loading and unloading work at the X dock and proposed extension.

12. On March 12, 1964 Santa Fe notified the Clerks of that arrangement and at the request of the Clerks, representatives of Santa Fe met with representatives of the Clerks on April 7, 1964 to review the problems posed by the arrangement agreed upon by Santa Fe and Republic. They were unable to resolve their differences by agreement.

13. On April 13, 1964 Santa Fe posted notices at Corwith abolishing approximately 100 positions effective April 27, 1964 and advising the incumbents of those positions to exercise their seniority. The next day the effective date was changed to April 26. After the filing of the instant suit, the effective date was postponed to May 11, 1964.

14. Preceding the above events regarding the lease arrangement, and specifically on May 31, 1963 Clerks had served upon Santa Fe notices pursuant to Section 6 of the Railway Labor Act, 45 USC §156, to revise all existing agreements. The notices proposed, among other things, an immediate general wage increase, automatic future annual wage increases, cost-of-living adjustment, improved vacations, hospital and life insurance benefits and holiday pay. In addition, the notices requested a rule that:

“Section 1. The number of employees in each of the occupational classifications as of May 31, 1963 covered

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by the agreement between the carrier and the organization shall not be reduced for any reason excepting through normal attrition, and such reduction shall not exceed 2% per year.

.

Section 3. None of the work of the carrier now being performed, or susceptible of being performed, by employees coming within the scope of the agreement between the carrier and the organization, will be contracted out or otherwise transferred to other establishments or employers, and no existing arrangement under which such work is now being performed by other establishments or employers shall be continued, excepting upon agreement between the carrier and the duly authorized representative of the organization."

The notices also requested a rule providing for economic protection for employees adversely affected by such changes as transfers to other employers.

15. By letter dated June 17, 1963 Santa Fe served upon the Clerks a Section 6 notice containing carrier's counter-proposals for changes in existing agreements. Santa Fe's proposed contract changes also related to wages, vacations, holidays, health and welfare and life insurance benefits, technological change and employee protection. In particular Santa Fe requested a rule that:

"1. All agreements, rules, regulations, interpretations or practices, however established, which interfere with or prohibit a carrier from exercising the following rights are hereby eliminated:

(a) The right to transfer work either permanently or temporarily from one facility, location, territory, department, seniority district or seniority roster to another.

(b) The right to abandon partially or entirely any operation or to consolidate any facility or service heretofore operated separately.

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(c) The right to contract out work.

(d) The right to lease or purchase structures, facilities, equipment or component parts thereof, and to arrange for the installation, operation, maintenance or repair thereof by employees other than those of the carrier."

16. Immediately after the serving of the respective Section 6 notices, the parties agreed to bargain collectively on a national basis. After numerous bargaining meetings were held and no agreement being reached, the parties invoked the services of the National Mediation Board pursuant to the Railway Labor Act. The Board docketed the case as No. A-7128. The parties are now bargaining collectively regarding their notices under the auspices of the National Mediation Board.

17. Nothing in the current basic collective agreement dated November 3, 1963 between the Clerks and Santa Fe or any other agreement or practice restricts the right of Santa Fe to abolish the positions at Corwith as a result of Republic taking over its own loading and unloading operations at X dock and extension. Rule 16 and 17 thereof, which have in substance been a part of the agreement in effect between the parties for more than 20 years provide for not less than 5 days written notice to affected employees when regular forces are reduced or bulletined positions are abolished and for status and treatment of employees laid off on account of reduction in force. It has been the practice in the past for Santa Fe to adjust the size of forces according to the volume of work done.

18. Clerks concede that no claim is made in the instant proceeding that any express provision of the existing collective bargaining agreement between Clerks and Santa Fe precludes Santa Fe from consummating the lease and transfer of work.

Conclusions of Law

1. The court has jurisdiction of the parties and the subject matter.
2. Since it is conceded that nothing in the present agree-

Clerks v. Santa Fe R. Co.

ments in any way limits Santa Fe's right to enter into the lease demanded by Republic or to abolish the positions at Corwith's X dock and extension, no part of present controversy lies within the exclusive jurisdiction of the National Railroad Adjustment Board under Section 3 of the Railway Labor Act, 45 U. S. C. § 153.

3. The action of Santa Fe violates no law and no agreement with the Clerks and hence cannot be enjoined by the Court.

4. The fact that the Clerks have demanded from Santa Fe, in a notice duly served under Section 6 of the Railway Labor Act, a rule which would limit Santa Fe's right to abolish positions under any circumstances can have no effect on the rights of Santa Fe and the Clerks unless and until such rule actually becomes a part of the agreement between them. Unless and until such rule is agreed upon, the rights of the parties are as defined in existing rules and practices, including the basic collective agreement between the Clerks and Santa Fe dated November 3, 1963.

5. The relief herein sought by the Clerks must be denied and the complaint is dismissed.

[Discussion]

A hearing was had on the merits in the above cause in order to expedite determination on all facets of this suit without, however, effecting a waiver of defendant's motion to dismiss for failure to state a claim.

The court has concluded that the defendant's motion to dismiss should be sustained, and has this day signed and entered the above Findings of Fact and Conclusions of Law.

The court is persuaded by the rationale of the cases and authorities cited by defendant that institution of negotiations for collective bargaining pursuant to a Section 6 notice does not change the authority of a carrier to terminate employment of workers if such authority is not surrendered by the terms of an existing agreement or in violation of law; that the status quo referred to in § 6 is directed at preventing alteration of existing working conditions and not those proposed by a § 6 notice.

Clerks v. Santa Fe R. Co.

In this suit no issue is presented on the interpretation of the contract between the parties for it has been conceded by plaintiff that defendant's action constituted no violation of that contract. Thus, that action caused no change in existing conditions of employment covered by the agreement, and there exists no labor dispute, minor or major, between the litigants. Accordingly, there being no claim alleged upon which relief can be granted, the motion to dismiss is sustained and an order in accord therewith has this day been entered.

*Flight Engineers v. Western Air Lines***APPENDIX K**

Flight Engineers International Association, WES Chapter, AFL-CIO, Plaintiff v. Western Air Lines, Inc., Defendant.*

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
CALIFORNIA, CENTRAL DIVISION

Civil No. 362-61-PH. April 28, 1961

[Nature of Proceedings]

HALL, D. J.: On April 11, 1961, the above case came on for hearing by order to show cause on plaintiff's motion for preliminary injunction, Charles K. Hackler, Esquire, and Ronald Scheinman, Esquire, appearing for plaintiff and Hugh W. Darling, Esquire, Donald K. Hall, Esquire, and D. P. Renda, Esquire, appearing for defendant. Having considered plaintiff's verified complaint, the affidavits and memoranda of the parties, the stipulations of counsel made in open court and the evidence taken, having taken judicial notice of the record in a prior action in this Court, entitled "*Western Air Lines, Inc., Plaintiff, v. Flight Engineers International Association, et al., Defendants*", Civil Action No. 178-61-HW, and having heard arguments of counsel, and being fully advised, the Court makes the following Findings of Fact, Conclusions of Law and Order with respect to the order to show cause and plaintiff's motion for preliminary injunction.

Findings of Fact

1. Plaintiff Flight Engineers International Association, WES Chapter, AFL-CIO ("the Union"), is and at all times material to this case was an unincorporated association functioning as a labor organization.

2. Defendant Western Air Lines, Inc. ("Western") is

* 43 CCH Lab. Cas. ¶ 17,064.

Flight Engineers v. Western Air Lines

and at all times material to this case was a common carrier by air engaged in interstate and foreign commerce and the transportation of mail for the United States Government, pursuant to certificates of public convenience and necessity issued to it by the Civil Aeronautics Board, an instrumentality of the United States Government, and as such is a carrier by air within the provisions of Sections 201, *et seq.*, of the Railway Labor Act (45 U. S. C. A. §§ 181 *et seq.*).

[Applicable Collective Bargaining Agreement]

3. As of April 11, 1958, Western entered into a collective bargaining agreement (the "collective bargaining agreement") with its flight engineers, as represented by the Union. By its terms the collective bargaining agreement superseded a prior agreement between Western and its flight engineers, as last amended July 29, 1957, and was to continue in full force and effect until January 1, 1961, thereafter to be subject to change as provided for in Section 6 of the Railway Labor Act (45 U. S. C. A. § 156).

[Establishment of "System Board"]

4. As of April 11, 1958, Western also entered into an agreement with its flight engineers, as represented by the Union, for the establishment, pursuant to Section 204 of the Railway Labor Act (45 U. S. C. A. § 184), of a Western Air Lines Flight Engineers' System Board of Adjustment (the "System Board"). By its terms this agreement also was to continue in full force and effect until January 1, 1961, thereafter to be subject to change as provided for in Section 6 of the Railway Labor Act (45 U. S. C. A. § 156).

5. It was stipulated that the collective bargaining agreement and the agreement establishing the System Board are now and at all times since January 1, 1961, have been in full force and effect.

[Injunction Sought by Union]

6. By this action for injunction, the Union seeks an order enjoining Western from employing any flight engi-

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neer who does not hold an A & E or A & P mechanic certificate at the time of employment and directing Western to discharge all flight engineers now in its employ who do not hold one or the other type of mechanic certificate.

[Contention of Union]

7. The Union's suit is predicated on the collective bargaining agreement and on Western's practice prior to February 17, 1961, of requiring that its flight engineers hold A & E or A & P mechanic certificates at the time of employment. The Union contends that Western's practice established a "rule" or "working condition" which under Section 6 of the Railway Labor Act (45 U. S. C. A. § 156) Western was required to maintain during the period of negotiations for a change in the collective bargaining agreement and that in any event the flight engineers employed by Western since February 17, 1961, do not have the qualifications prescribed in the collective bargaining agreement.

[Employer's Contentions]

8. Western conceded that its practice prior to February 17, 1961, was to require that applicants for positions as flight engineers hold A & E or A & P mechanic certificates at the time of employment, but it disputed that such practice established a "rule" or "working condition" which it was required to maintain during negotiations for a change in the collective bargaining agreement. Western further maintained that it is complying with the collective bargaining agreement, that all of the flight engineers hired by it since February 17, 1961, meet the qualifications prescribed in the collective bargaining agreement and that in any event this Court has no jurisdiction to construe or interpret the agreement in this regard, the System Board being vested by the Railway Labor Act with the sole and exclusive jurisdiction to interpret and apply the collective bargaining agreement.

9. Since February 17, 1961, Western has employed a substantial number of flight engineers who do not hold either an A & E or an A & P mechanic certificate, but all of such

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individuals are certified flight engineers and, in addition, hold commercial pilot licenses with instrument ratings, at the least.

[Applicable Civil Air Regulations]

10. The applicable Civil Air Regulations of the Federal Aviation Agency (and the predecessor Civil Aeronautics Administration) provide that no individual shall serve as a flight engineer in air commerce on an aircraft of United States registry without a "flight engineer certificate" issued by the Administrator. It is not required or suggested that a flight engineer also hold a mechanic certificate of any type.

[Terms of Collective Bargaining Agreement]

11. Section 3 of the collective bargaining agreement reads:

"SECTION 3

"QUALIFICATIONS

"(A) Any employee who qualified and was designated as Flight Engineer prior to the effective date of this Agreement shall be deemed to have met all the requirements for the position of Flight Engineer in existence as of that date. In the event additional requirements initiated by the Company are imposed, Flight Engineers in the employ of the Company shall be granted a reasonable period in which to meet such additional requirements on Company time and at Company expense.

"(B) 1. Except as hereinafter provided in sub paragraph (2) of this paragraph (B) each Flight Engineer employed by the Company will be required to have a mechanic's certificate issued by the CAA with power-plant and air-frame ratings (A & E or A & P certificates) or hold a degree in engineering from an accredited college or university granting such degrees (only after the completion of a course normally requiring classroom attendance for a period of four (4)

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years) together with practical experience in the construction, maintenance and repair of aircraft and/or engines.

"2. Any employee who does not hold an A & E or an A & P certificate or an engineering degree, as aforesaid, at the time of his employment, but who has the shop experience or other mechanical qualifications to be able to secure such certificate within twelve (12) months after being designated for active line flying duty as a Flight Engineer with the Company, may be employed as a Flight Engineer by the Company, and as a condition of his continued employment as a Flight Engineer, shall obtain such A & E or A & P certificate with said twelve (12) month period.

"3. The Company agrees that, anything to the contrary in this Agreement notwithstanding [sic] it will dismiss as a Flight Engineer any employee covered by sub paragraph (2) of this paragraph who does not obtain an A & E or an A & P certificate within twelve (12) months of his being designated for active line flying duty as a Flight Engineer by the Company."

It is significant that the provisions contained in paragraph (B), subparagraphs 1, 2 and 3, of the foregoing Section 3 were added to the collective bargaining agreement in 1958 by negotiation.

[Changes in Agreement Sought by Union]

12. On November 28, 1960, the Union notified Western in writing that it desired to reopen the collective bargaining agreement. On December 28, 1960, and on January 4, 1961, the Union submitted detailed proposed changes in the agreement, none of which involved Section 3. No change in Section 3 has been proposed by the Union at any time.

[Employee's Refusal to Work]

13. Commencing on February 17, 1961, while conferences pursuant to Section 6 of the Railway Labor Act (45 U. S. C. A. § 156) were in progress on the Union's proposed

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changes in the collective bargaining agreement, Western's flight engineers, as a group, refused to report for work and to take any of Western's flights. Concurrently, the flight engineers of American Airlines, Eastern Air Lines, National Air Lines, Trans World Airlines, Pan American Airlines and the Flying Tiger Line also went out on strike across the nation. It was alleged that these walkouts were part of a nationwide flight engineer demonstration against a ruling by the National Mediation Board in a representative dispute under Section 2 Ninth of the Railway Labor Act (45 U. S. C. A. § 152) involving United Air Lines.

14. The flight engineer walkout brought to a standstill all air transportation operations of the affected air carriers, including Western.

[Strike Temporarily Restrained]

15. On February 18, 1961, Western filed an action in this Court entitled "*Western Air Lines, Inc., Plaintiff, v. Flight Engineers International Association, et al., Defendants*", Civil Action No. 178-61-HW, to enjoin the strike by its flight engineers. The Union and its officers and the Flight Engineers International union and its president were named as defendants as representatives of the striking flight engineers. On the same date a temporary restraining order was issued in such action by the Honorable Ernest A. Tolin, United States District Judge, enjoining the defendants therein from engaging in and continuing the strike against Western. The restraining order was served on the president and vice president of the Union on February 18, 1961, and on February 19, 1961, each member of the Union was advised of the restraining order by telegram sent by the Union. Notwithstanding the restraining order, the strike continued. On February 20, 1961, Western filed a dismissal of Civil Action No. 178-61-HW.

[Employees Discharged]

16. After commencement of the strike, each of Western's flight engineers was personally contacted at the time scheduled or assigned for flights and instructed to report for

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work. Flight engineers who refused to report for work were discharged. The number of flight engineers who refused to report for duty and were discharged by Western was 123. Seven flight engineers did not refuse to report for duty and are now flying for Western. Western has hired flight engineers to replace those discharged and with the replacements has resumed a substantial portion of its air transportation operations.

17. On February 21, 1961, the Secretary of Labor of the United States, having taken notice of the nationwide tie-up in air transportation, issued a statement urging the flight engineers to return to work and on the same date the President of the United States appointed a fact finding board to inquire into the issues giving rise to the tie-up. All the affected air carriers, except Western, were named in the Executive Order. On February 23, 1961, the Executive Order was amended to add Western as a subject of inquiry. Neither the Secretary of Labor's statement nor the President's Executive Order had the force and effect of law. The Executive Order simply created a fact finding board to report to the President and the Secretary of Labor's statement simply requested voluntary action on the part of all concerned, employers and employees, which either were at liberty to disregard.

[Contract Changes Sought by Employer]

18. This action was filed on March 28, 1961. At a further bargaining conference held on March 29, 1961, Western submitted its proposed changes in the collective bargaining agreement, which proposed changes included the elimination of Section 3.

19. On April 7, 1961, Western submitted to the System Board the question of whether or not it was in compliance with Section 3 of the collective bargaining agreement, with respect to the qualifications of the flight engineers employed by it since February 17, 1961.

[Equitable Defenses Raised by Employer]

20. In addition to the contentions set forth in finding 8, Western interposed certain equitable defenses to the grant-

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ing of a preliminary injunction in this action, including the defense that the Union was not before the Court with clean hands by reason of illegal strike action against Western, wilful disobedience of the temporary restraining order issued by this Court in Civil Action No. 178-61-HW enjoining the strike and the placing of flight engineer pickets at Western's places of business commencing on April 7, 1961. Western contended that the Union, jointly with the Flight Engineers International union, had ordered and directed the walkout of Western's flight engineers and the disregard of the order enjoining the strike and had ordered and is directing the picketing which is now going on against Western. The Union disputed this, but conceded that if the strike was Union-sponsored the Union violated the Railway Labor Act. In view of the conclusions hereinafter reached, it is unnecessary to rule on any of Western's equitable defenses, and the Court expressly makes no finding on whether or not the flight engineers strike or the failure to comply with the restraining order in Civil Action No. 178-61-HW or the picketing was or is sponsored by the Union, directly or indirectly, in concert with the Flight Engineers International union or otherwise.

Conclusions of Law

[Certificate Requirement Not a "Rule"]

1. Western's practice prior to February 17, 1961, of requiring that flight engineers hold an A & E or an A & P mechanic certificate at the time of employment did not establish a "rule" or "working condition" which Western was required to maintain during negotiations for a change in the collective bargaining agreement. A reading of Section 6 of the Railway Labor Act (45 U. S. C. A. § 156) in connection with other applicable Sections of the Act, particularly subdivisions (5), Sixth and Seventh of Section 2 (45 U. S. C. A. §§ 151a and 152), compels the conclusion that only agreements reached after collective bargaining are covered by Section 6 and that the prohibitions of Section 6 against change in rules or working conditions pending bargaining, and those of Section 2, Seventh, apply only

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to rules and working conditions previously fixed by collective bargaining agreements. *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, 400, 402, 403 [5 LC ¶ 51,130] (1942).

[No Jurisdiction over Minor Dispute]

2. The question of whether or not the flight engineers hired by Western since February 17, 1961, have the qualifications prescribed in the collective bargaining agreement involves the meaning and application of subparagraphs 1, 2 and 3 of Section 3 (B) of the agreement. Under the Railway Labor Act, and particularly subdivisions (5) and Sixth of Section 2 (45 U. S. C. A. §§ 151a and 152), Section 3 (45 U. S. C. A. § 153) and Section 204 (45 U. S. C. A. § 184), such issue is a "minor dispute" over which the System Board has sole and exclusive jurisdiction. This Court has no jurisdiction to go into or resolve the merits of the dispute or to construe or interpret the provisions of the collective bargaining agreement. *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 725 [9 LC ¶ 51,212] (1945); *Railroad Trainmen v. Chicago River & I. R. R. Co.*, 353 U. S. 30, 33, 39 [32 LC ¶ 70,566] (1957); *Locomotive Engineers v. M-K-T R. Co.*, 363 U. S. 528, 531 [40 LC ¶ 66,631] (1960).

3. Plaintiff is not entitled to a preliminary injunction.

Order

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed:

1. That the order to show cause issued herein on March 28, 1961, be and it is vacated.

2. That plaintiff's motion for preliminary injunction be and it is denied.

*Trainmen v. Illinois Terminal R. Co.***APPENDIX L**

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT
OF MISSOURI, EASTERN DIVISION

BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary unincor-
porated labor organization, *Plaintiff*,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY, a corporation,
Defendant.

No. 66 C 96 (3)

MEMORANDUM & ORDER *

This action brought by the Brotherhood of Railroad Trainmen against the Illinois Terminal Railroad Company seeks an injunction restraining defendant from putting into effect certain work assignments as posted in its bulletins T-54 and T-55. A hearing was held on an order to show cause why the injunction prayed for should not be issued, and by consent of the parties the status quo was to be maintained until the final determination of the cause by the Court. Defendant also filed a motion to dismiss which was taken as submitted along with the case.

Defendant operates a railroad in interstate commerce and maintains its principal office in St. Louis, Missouri. Plaintiff is an unincorporated labor organization which is certified as the bargaining agent for the employees of defendant engaged in railroad train and yard service. Both plaintiff and defendant are subject to and governed by the Railway Labor Act.

The parties entered into a collective bargaining agreement effective as of September 1, 1957 and a supplemental agreement dated as of November 26, 1964. On or about February 28, 1966, without prior notice to plaintiff, defendant posted upon its bulletin boards maintained at its

* Unreported.

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McKinley Junction and Federal yards bulletin T-54, and on or about March 1, 1966, similarly posted bulletin T-55. Essentially, insofar as this case is concerned, these bulletins operated to change the "on and off" duty points of assignment 508 and assignment 513, from McKinley Junction to A. O. Smith, as well as the starting time of assignment 513. Prior thereto, the trainmen involved (six in all) had reported for duty at McKinley Junction.

For years, defendant had required the diesel crews involved in these two assignments to report for duty at McKinley Junction, Madison, Illinois. The only other previous on-and-off duty point of assignment had been Federal. Defendant presently maintains bulletin boards only at these two points. So, too, lighted parking lots, lockers, and toilet and shower facilities have been provided only at the McKinley Junction and Federal yards.

The evidence shows that there has been a constant increase in work in the A. O. Smith area (8 rail miles and 5 highway miles from McKinley Junction) so that presently the full time use of a switch engine is required. For a short period of time, the crews of the two job assignments here involved were taxed at defendant's expense to and from McKinley Junction and the A. O. Smith location after reporting for duty, with the resultant loss to defendant of some 90 minutes of productive time. As for the change in starting time, the evidence shows that for years similar changes had been made unilaterally by defendant to meet its requirements, without consultation with plaintiff.

Plaintiff contends that the issuance of bulletins T-54 and T-55 constitute an attempt by defendant to change the working conditions as prescribed by the existing collective bargaining agreement, while defendant urges the contrary.

The parties are not in agreement as to whether the dispute between them is a "major" or "minor" one. It is the position of the defendant that the action it is taking is not specifically prohibited by the existing collective bargaining agreement, and it argues for a construction of the various provisions thereof authorizing it, as a prerogative of management, to create an additional on and off duty

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location at the A. O. Smith plant for job assignments 508 and 513. Plaintiff argues that the proper interpretation of the agreement precludes the action which defendant is proposing, and that for such reason defendant's contemplated action will constitute a violation of the agreement.

We have carefully read the collective bargaining agreement and the amendment thereof, and have concluded that the proper resolution of the respective contentions of the parties depends upon the interpretation and application of the terms and provisions of the agreement in the light of all of the facts and circumstances. The difference between major and minor disputes is that the latter pertain to the interpretation and determination of existing agreements, whereas the former involve new agreements and changes in existing contracts. *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711. In our view, the dispute between the parties in this case is a "minor" dispute within the meaning of the Railway Labor Act.

The fact that plaintiff has also served a Section 6 notice on defendant with respect to the matters here involved (without waiving its contention that the matters are governed by the existing agreement) does not operate to change this minor dispute into a major dispute. Having determined that the dispute is a minor one, it follows that the resolution thereof is within the exclusive jurisdiction of the National Railroad Adjustment Board, and that this Court has no jurisdiction to adjudicate the merits of the controversy.

Plaintiff argues that irrespective of whether the dispute be held to be major or minor, this Court should require defendant to maintain the status quo pending the exhaustion of the procedures of the Railway Labor Act. So far as we are advised, neither party has yet invoked the jurisdiction of the National Railroad Adjustment Board. Whether or not in this factual situation this Court has jurisdiction to order the maintenance of the status quo, as plaintiff argues, we find no basis in the facts for the exercise of such jurisdiction.

Plaintiff has not demonstrated it will suffer irreparable

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injury, which is normally required as a basis for granting this extraordinary relief here sought. Nor has plaintiff convincingly shown there are any considerations of public policy in the immediate factual situation which would warrant the grant of a status quo injunction in the absence of a showing of irreparable injury.

In view of the foregoing, defendant's motion to dismiss should be and is hereby sustained, the order to show cause is discharged, and It Is HEREBY ORDERED that plaintiff's complaint be and it is hereby dismissed.

Dated this 24th day of May, 1966.

/s/ JOHN K. REGAN,
United States District Judge.

*TCEU v. Illinois Central R. Co.***APPENDIX M**

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
MISSISSIPPI, JACKSON DIVISION

Civil Action Number 4192

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
ET AL, *Plaintiffs*,

v.

ILLINOIS CENTRAL RAILROAD COMPANY, *Defendant*

OPINION *

The plaintiffs seek a temporary injunction against the defendant to enjoin it from putting into operation a computer complex on its system which is designated as "M-A-I-N." The suit seeks to maintain the status quo with respect to jobs which may be altered by the installation of this expensive, but very helpful and modern communication. Realistically, the installation of this equipment along this entire railroad system may result in some job changes which the members of the plaintiffs' union will probably contend belong to them, while the members of another union known as Brotherhood of Airline and Railway Steamship Clerks claim such jobs as belonging to them; and the defendant presumably shares the view of the latter group. The Clerks' union is not a party to this suit. The plaintiffs have invoked the aid and assistance of the National Mediation Board under what is called a §6 notice.¹

* Unreported.

¹ The services of the National Mediation Board has been enlisted by plaintiffs in this case. 45 U.S.C., 1946 ed., § 156 (Section 6 of the Railway Labor Act), among other things, provides: "Rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of services of the Mediation Board." The board has not organized or entered upon any hearing of this matter at this time.

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The validity and tenability of such notice and the proceeding thereunder is assailed. Defendant contemplates putting this system into operation early in October 1967 unless enjoined. The plaintiffs contend that the status quo requirement of 45 U.S.C. §156 (Section 6 of the Act) makes it mandatory that the railroad desist from such action in complying with such requirement of the act. The defendant, on the other hand, says that the status quo requirement of the act relates to any change in the express provisions of the contract itself, and not in mere technological, operational and organizational changes which it has the contract right to make under its mediation agreement with plaintiffs. Thus, it is sought to have the Court now enjoin the railroad from putting into effect this new system of communication designed to effect large economies and expedite and facilitate better service to the public, until the board has decided to whom such new jobs created thereby will belong. There is nothing in the act which provides that the board can protect the subject of such a dispute pending its determination thereof.

Counsel on both sides have stipulated as to the undisputed facts in this case for the purpose of this hearing on this application for a temporary injunction and have not augmented or supplemented such stipulation by any other or further evidence or testimony. A delay in the operation of the "M-A-I-N" computer system would result in very large financial losses to the railroad as stated in paragraph 22 of the stipulation. The losses which plaintiffs contend they will suffer in the absence of an injunction appear as argumentative conclusions not supported by any fact. On the other hand, the railroad by its stipulation and in oral argument before the Court assures the Court in §21 of the stipulation that plaintiffs and its members will be protected and lose nothing on any job position this year, or even longer, if necessary. No emergency necessitating injunctive relief is thus shown to exist. The relative rights and positions of the parties must be considered and the equipoise of probabilities weighed and considered for a proper determination as to the duty of the Court, or not, to issue such extraordinary processes now. The Court will make no decision further than is absolutely necessary to

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a solution of the problem before the Court without impairing the questions to be considered and decided on final hearing.

It is the view of this Court under the circumstances that nothing contemplated to be done by the defendant in the installation of such "M-A-I-N" computer system while this controversy remains before the National Mediation Board can, or will affect, or impair any vested right of the plaintiff union, or its members as prescribed by §156, *supra*. There would appear no sound reason for deferring the operation of this valuable equipment until this collateral question is decided. But a discharge of an employee whose job was obviated and made useless or unnecessary by installation of the equipment is not contemplated by the Court in this decision.

The installation by the carrier of this modern "M-A-I-N" computer system on its lines does not come as any change in any existing contract between the parties. Actually, it is in furtherance of an express provision in the mediation contract between these parties.² It may well be doubted on reliable precedent that the Section 6 notice in suit is a notice within the purview of 45 U.S.C. §156, *supra*. The Clerks are not parties to this suit, but the plaintiffs seek by this notice to ingraft upon the contract a clause which would confer jobs created by the use of this new equipment upon the plaintiffs rather than the Clerks.³

² The mediation agreement of February 7, 1965 between the parties in Article 3, Section 1 provides: "The organizations recognize the right of the carriers to make technological, operational and organizational changes, and in consideration of the protective benefits provided by this Agreement the carrier shall have the right to transfer work and/or transfer employees throughout the system which do not require the crossing of craft lines."

³ A jurisdictional dispute between unions over a job is not to be resolved by the Courts under that act. *Southern Pacific Co., et al v. Switchmen Union of North America*, (9CA) 356 F.2d 332 so holds. Significantly, appellees' complaint there to enjoin such work was dismissed by the trial court and no appeal was taken. The appeal involved the carrier's counter action and that of the affected union for a counter claim and summary judgment which was denied by the trial court and granted by the Court of Appeals. The Court said that Section 6 of the act was not designed or intended for the purpose sought.

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The view expressed in *Southern Pacific* by the Ninth Circuit is shared by the National Mediation Board as well as by the Courts.⁴ There would appear to be no basis or justification for the granting of a temporary injunction in this case and such request is denied. This memoranda and the stipulation of the parties suffice to conform with the requirements of Civil Rule 52 in this case.

A judgment accordingly may be presented.

s/ HAROLD COX
United States District Judge.

October 4, 1967

⁴ *Williams, et al v. Jacksonville Terminal Co.*, 315 US 386, 62 S. Ct. 659; *Norfolk & Portsmouth Belt Line Railroad Co. v. Brotherhood of Railroad Trainmen, Lodge No. 514, et al*, (4CA) 243 F.2d 34.

*SP&S R. Co. v. Conductors***APPENDIX N****UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA**

Civil Action No. 2528-66

SPOKANE, PORTLAND & SEATTLE RAILWAY Co.,*v.***ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN**

Transcript of Proceedings, April 25, 1967

* * * * *

[2] Mr. HILL (Counsel for the ORC&B): . . . I have handed up to the Court and have given to Mr. Shea a draft of preliminary injunction. It is the typewritten draft before Your Honor. I have given a copy to Mr. Shea. It incorporates all the changes we have been able to agree on, but there are still some areas of dispute which Mr. Shea wishes to present to the Court. I think at this time I should let him present his objections to this draft, sir.

The COURT: Before counsel proceed, perhaps it may simplify and expedite matters if I very briefly and simply state what I had in mind.

I had in mind that there was an agreement between the parties, that March 25th agreement. There is a dispute as to what it meant. That dispute was submitted, and properly submitted under the law, to the National Railway Adjustment [3] Board.

Incidentally, the submission was made by the carriers, although it makes no difference which party submitted it.

When the Board shall have spoken, its interpretation will constitute the agreement between the parties. Either side can institute proceedings by Section 6 notice to change it; but until that is accomplished the agreement will remain.

Now my purpose or the thought I had in mind, my in-

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tention was to issue an injunction to maintain the status quo until the Board makes its decision, a partial status quo, to provide that no crew shall be reduced below one conductor and two brakemen. I had no intention of going beyond that.

Now I have not seen the two drafts, but I thought I would indicate to you gentlemen what I had in mind in rendering my decision. I thought I made it clear, perhaps I didn't, but this may simplify this.

[5] The COURT: Here we have an agreement. The question is what the agreement means.

Mr. SHEA (Counsel for the railroad): Right.

The COURT: The Adjustment Board has before it the proceeding to determine the meaning. Now I dissociate that entirely from the proceedings under a Section 6 notice.

It is a fact that in my opinion I went a little further in order to summarize the entire situation.

[11] Mr. HILL: Your Honor, to address myself to these points in order, first may I address myself to paragraph 2 of the draft which I submitted, which would also require the status quo to be continued until the present Section 6 major dispute controversy between the parties has proceeded through the National Mediation Board. Now the reason I added that was for this reason: it depends on what the Adjustment Board does with the minor dispute. If the Adjustment Board should uphold the contention of the union that the March 1965 agreement establishes a minimum crew consist of one and two, that of course is the end of the matter. There would be no need then for the labor organization to continue to pursue its Section 6 notice asking for such an agreement if the Adjustment Board held that there already was one.

But now let us assume that the Adjustment Board holds to the contrary. Before the Adjustment Board the railroad has claimed that there never was a crew consist rule on this

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railroad and that the agreement of March 1965 was not intended to establish one, that it was an attrition agreement, that it had nothing to do with crew consist. If that is true, then we still have an outstanding Section 6 notice to [12] establish an agreement pending before the Mediation Board on a railroad which claims there never was such a rule and which contention has been upheld by the Adjustment Board; but the railroad is still under this Court's decree in the Akron case, which requires it to maintain the status quo which existed during the two-year period of the Award of Board 282 until it is changed by proceedings under Section 6, and it would still be under the mandatory requirement of Section 6 of the Railway Labor Act, which says that it must maintain the status quo while a major dispute is pending.

So it seemed to me that paragraph 2 was necessary. Otherwise, we would get into the situation where this railroad, following a victory before the Adjustment Board, could be free to change crew consist as it pleased, despite the decree of this Court in Akron and despite the status quo provision of Section 6 of the Railway Labor Act.

The COURT: Well, now, Section 6 of the Railway Labor Act merely provides that there shall be no changes in existing agreements; but if the Adjustment Board should hold that there was no agreement, then the requirements of Section 6 would not be binding, would they?

Mr. HILL: I think so, sir. I respectfully suggest that Section 6 requires the railroad to continue to observe [13] existing agreements, rates of pay and working conditions.

The COURT: But if the Board says there was no agreement—

Mr. HILL: Then at least there was a working condition. It seems to me that was the effect of the decision of this Court in—

The COURT: Of course, I don't see how that situation can arise. There is an agreement of March 25th, 1965. Let's assume that there was no prior agreement. There is an agreement of March 25th, 1965. Everybody must concede that that is an agreement. The only question is as to what does it mean.

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Now, therefore, all that the Board is going to do, I assume, or I venture to say with due respect to the Board this is all it should do, is to construe the March 25th, 1965 agreement.

Now if it agrees with the contention of the union, the Court, of course, by injunction, can force the carriers to abide by the construction the Board puts upon the agreement. But what authority would the Court have to do anything else?

Mr. HILL: If the Adjustment Board should uphold the contention of the carriers that the March 1965 agreement [14] was not a crew consist agreement and does not of itself create a minimum crew consist, we then have a railroad on which there was never any crew consist agreement whatever, but it did operate for 50 years under the state full crew laws and it did so during all of the period of the Award of Arbitration Board No. 282, and before that period was up the union served a Section 6 notice to continue an agreement or to create an agreement which would continue a minimum crew consist.

It seems to me, Your Honor, that that crew consist which existed for 50 years and during the two-year period of the Award is a working condition which must be maintained—

The COURT: In other words, is it your point that the full crew laws in themselves are equivalent to an agreement?

Mr. HILL: Exactly, sir.

The COURT: Well, I think there is some merit in that contention.

Well, I have this in mind: I don't like to issue injunctions to take care of possible contingencies in the future that may not arise. I would rather just maintain the status quo until the decision of the Adjustment Board, because if it decides in your favor, why, you will be perfectly content. It may be that then the carriers will serve a [15] Section 6 notice. But if they decide against you and you feel that you are entitled to some other relief, you can come to this Court and I will act very promptly.

In The

FEB 17 1936

Supreme Court Of The United States

October Term, 1935

No. 29

THE DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY*Petitioner,*BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEMEN,*Respondent.*On Petition For Writ of Certiorari To The United States
Court of Appeals For the Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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In The
Supreme Court Of The United States

October Term, 1968

No. 900

THE DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY *Petitioner,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEMEN, *Respondent.*

On Petition For Writ of Certiorari To The United States
Court of Appeals For the Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

This brief is filed by the United Transportation Union, successor organization to the Brotherhood of Locomotive Firemen and Enginemen named as respondent herein. The United Transportation Union, with headquarters and principal offices at 666 Euclid Avenue, Cleveland, Ohio, is a new union formed by the merger, effective January 1, 1969, of the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, the Switchmen's Union of North America, and the Order of Railway Conductors and Brakemen. It is comprised of the former members of said organizations, and has succeeded to and assumed all the rights and obligations of said four organizations.

QUESTION PRESENTED

May a court enjoin a carrier from unilaterally effecting changes in its employees' working conditions, prior to exhaustion of the Railway Labor Act's major disputes handling machinery invoked by a union's notice demanding a new contract provision which would modify the existing contract so as to prohibit the changes in question, while the dispute is pending before the National Mediation Board upon its acceptance of jurisdiction?

STATEMENT OF THE CASE

Petitioner's statement of the facts involved, while somewhat abbreviated and incomplete, is for the most part substantially accurate and will only be briefly supplemented here.

Prior to the events resulting in this litigation, petitioner The Detroit and Toledo Shore Line Railroad Company had throughout its history maintained only one home terminal or point of reporting for duty for its train and engine service employees, at Lang Yard in Toledo, Ohio. However, commencing in 1961 it sought to establish certain assignments to originate at Trenton, Michigan, some 33 miles away, and respondent Brotherhood of Locomotive Firemen and Enginemen (BLF&E) and the Brotherhood of Railroad Trainmen (BRT), a co-defendant in this action, sought through Section 6 notices under the Railway Labor Act (45 U.S.C. Sec. 151 et seq.) to obtain contractual protective conditions for employees who would be affected (pp. 8a, 11a-12a).¹

The resulting dispute was handled to a conclusion under the major disputes machinery of the statute without agreement being reached, and on March 4, 1963, following refusal of the parties to arbitrate, the National Mediation Board

¹ Appendix to Petition for Certiorari.

terminated its services, leaving the parties free to resort to self-help (pp. 26a-27a).

The Shore Line, however, did not at that time make any move to create the new assignments at Trenton, which had been the subject of the dispute. Instead, on September 24, 1963, it created new assignments for the manning of a work train to operate out of Dearoad, Michigan, eleven miles from Trenton (p. 32a). The BLF&E then challenged creation of the Dearoad assignments as a contract violation (p. 9a) and withdrew its Section 6 notice seeking protective conditions at Trenton, the Shore Line having represented that it had abandoned its intention to establish a terminal point there (p. 27a).

Following rejection of this breach of contract claim by a Special Board of Adjustment on November 30, 1965 (pp. 32a-33a), the Shore Line revived its plans for Trenton, and on January 27, 1966, the BLF&E served a new Section 6 notice for an amendment to its existing agreement to provide that "all road service runs and/or assignments will originate and terminate at Lang Yard" (pp. 9a, 27a).

The parties were unable to reach agreement and on May 26, 1966, Shore Line posted a bulletin advising of its intention to establish certain assignments to operate out of Trenton commencing June 1 and 2, 1966 (P.A. 53a).² On May 27, 1966, BLF&E's President invoked the services of the National Mediation Board by telegram (P.A. 55a), followed by a formal application for the Board's services under date of June 17, 1966 (P.A. 60a). In the meantime Shore Line elected to cancel the assignments which it had bulletined on May 26 (P.A. 56a).

The National Mediation Board accepted jurisdiction of the dispute and docketed it as its Case No. A-7839, advising

² Plaintiff-Appellant's Appendix in the court below.

on June 28, 1966, that "A mediator will be assigned to mediate this dispute consistent with prior commitments" (D.A. 93b).³

On September 19, 1966, Shore Line again posted a bulletin announcing assignments originating at Trenton, whereupon the President of the BLF&E requested prompt assignment of a mediator by the Board (D.A. 94b); and the Board replied on September 26, 1966, stating that it would endeavor to comply as soon as possible (D.A. 95b).

On September 23, 1966, the Shore Line filed its complaint seeking an injunction against a strike by the BLF&E and the BRT. BLF&E counterclaimed for an injunction against the Shore Line compelling compliance with the mandates of the Railway Labor Act respecting maintenance of the *status quo*. The trial court denied the Shore Line's complaint against both defendants, and no appeal was taken as to the claim against BRT. The counterclaim of BLF&E was granted by the trial court, and sustained on appeal by the judgment sought to be reviewed.

ARGUMENT

It would be difficult to imagine anything more disruptive to the system of voluntary collective bargaining under the Railway Labor Act, or better calculated to defeat the Congressional purpose of avoiding interruptions to commerce through negotiation and conference, mediation, conciliation, and even investigation and recommendations by Presidential Emergency Boards, than the proposition, urged here by Shore Line, that while its employees are bound to pursue these steps to a conclusion before their admitted right to use economic self-help in a major dispute matures, the carrier may achieve its end by unilateral action with re-

³ Defendant-Appellee's Appendix in the court below.

spect to the very subject matter of the dispute, unhampered by any waiting periods or obligation to maintain the *status quo* existing when the dispute arose. What is contended by Shore Line would make a mockery of the statutory *status quo* requirements, *for what it is saying is that these do not apply unless it is already prevented by contract from making the unilateral changes in question.*

The District Court and the Court of Appeals properly rejected this contention, and their holdings are in accord with the provisions of the Railway Labor Act and the decisions of this court. There is no substantial body of authority to the contrary.

The decisions below do not stand for the proposition that *absent a pending major dispute being progressed in accordance with the statutory scheme* a carrier may not make operating changes where existing agreements do not restrict or prohibit the proposed action. But they do hold that where as here the changes in question have been made the subject of a notice, under Section 6 of the Act, seeking new contractual provisions which would control, and when the National Mediation Board has taken jurisdiction over the dispute, the carrier, as well as its employees, must postpone action until the statutory procedures for inducing agreement have run their course.

1. The decision below is in accord with the provisions of the Railway Labor Act setting forth the procedures to be followed and the conditions which must be observed in the handling of major disputes over the making or changing of collective bargaining agreements. These statutory provisions evidence the heavy reliance placed by Congress upon the National Mediation Board, and upon the implementation of the Act's voluntary procedures by "cooling off" periods during which the *status quo* was to be main-

tained by all parties, to achieve the statutory purpose of avoiding strikes and interruptions to commerce in major disputes.

When *either* party has set the Act's procedures in motion by serving notice of contract proposals under Section 6, the statutory prohibitions against changes in the *status quo* become operative. In the sections of the Act dealing with major disputes, the changes specifically prohibited are those in "rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose" (Section 5 First (b)); "rates of pay, rules or working conditions" (Section 6); and "the conditions out of which the dispute arose" (Section 10). Nowhere in those portions of the Act governing the handling of major disputes is there any indication that these *status quo* requirements are to be defined and limited by the scope of existing contract obligations.

Section 2 Seventh of the Act provides that a carrier may not change "rates of pay, rules, or working conditions of its employees, as a class *as embodied in agreements* except in the manner prescribed in such agreements or in Section 6 of the Act." The Shore Line argues that the other provisions of the statute should be read as if they included the italicized portion of Section 2 Seventh, thus narrowing the scope of the *status quo* required to be maintained during the processing of major disputes. But Section 2 Seventh does not even deal with the handling of major disputes nor does it purport to impose any *status quo* requirements in

connection therewith. Its effect, rather, is merely to attach legal and binding effect to collective labor agreements,⁴ and to prohibit their unilateral change or abrogation by carriers.

2. The decision below is supported by previous decisions of this Court and other federal courts, and there is no substantial body of pertinent authority to the contrary.

The courts have long recognized the obligations imposed by the Railway Labor Act for the maintenance of the *status quo* until the statutory procedures for the handling of major disputes are exhausted. Thus in *Elgin, Joliet and Eastern R. Co. v. Burley*, 325 U.S. 711, 725, this Court said:

"...The parties are required to submit to the successive procedures designed to induce agreement. Sec. 5 First (b). But compulsions go only to insure that *those procedures are exhausted before resort can be had to self-help.*" (Emphasis supplied.)

That the mandatory duty to bargain collectively in accordance with the procedures of the Railway Labor Act is equally applicable to carriers and their employees is further pointed up by footnotes 12, 18, and 26 to the opinion in the *E., J. & E.* case. (325 U.S. 711, at pp. 721, 725, and 730.)

Even apart from the specific *status quo* requirements of the Railway Labor Act, this Court has squarely held that the duty to bargain collectively carries with it the requirement to refrain from unilateral action, during the bar-

⁴This is a matter as to which there was considerable doubt at the time of enactment of the Railway Labor Act. See *J. I. Case Co. v. National Lab. Rel. Bd.*, 321 U.S. 332, and annotation at 88 L. Ed. 770, 772-773.

gaining process, with respect to the subject matter being negotiated. In *N.L.R.B. v. Katz*, 369 U.S. 736, 743, the Court said:

"... We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of Section 8 (a) (5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8 (a) (5) much as does a flat refusal."

To similar effect is the Court's decision in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, sustaining an order of the National Labor Relations Board "... restoring the status quo ante to insure meaningful bargaining..." (379 U.S. at p. 216).

Other decisions of this Court and other federal courts have recognized both the existence of the requirement to maintain the *status quo* during the handling of major disputes, and its applicability to railroads as well as their employees. One of the most recent decisions in point is that in *Brotherhood of Loc. Eng. v. B. & O. Co.*, 372 U.S. 284 (1963), where the court quoted its previous language (above) from the *E., J. & E.* case, and reaffirmed the proposition that the question of whether the major disputes handling procedures had been exhausted was determinative of a carrier's right to proceed with changes in the *status quo*. The principle was reiterated in *Railway Employees v. Florida E. C. R. Co.*, 384 U.S. 238. See also the decision of the Court of Appeals for the Fifth Circuit in the same litigation, reported as *Florida E.C. Ry. Co. v. Brotherhood of R. Trainmen*, 336 F. (2d) 172, and cases cited.

Additional cases have recognized the principle. Thus, in

Manning v. American Airlines, Inc., 329 F. (2d) 32 (C.A. 2, 1964), the court said:

"The propriety of an injunction to enforce the then unique provisions of the Railway Labor Act for maintaining the *status quo* while the parties to a labor dispute pursue various stages of negotiation, mediation, or arbitration, was established long ago. *Texas & N.O.R.R. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, 565-566, 50 S. Ct. 88, 74 L. Ed. 608 (1930). Although the *Texas & N. O.* decision antedated the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, the debates on that Act, 75 Cong. Rec. 5503-04 (1932), made clear that it was not intended to apply to injunctions of this nature. See *Railroad Yardmasters v. Pennsylvania R. R.*, 224 F. 2d 226 (3 Cir. 1955); *Chicago, R. I. & P. R. R. v. Switchmen's Union*, 292 F. 2d 61, 63-64, 66 (2 Cir. 1961), cert. denied, 370 U.S. 936, 82 S. Ct. 1578, 8 L. Ed. 2d 806 (1962)."

And, in concluding its opinion, the court remarked:

"The purpose of Section 6 was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted"

Similarly, in *Brotherhood of Railroad Trainmen v. Akron & B. B. R. Co.*, 385 F. (2d) 581, 597 (C.A.D.C., 1967), cert. den. 390 U.S. 951, the court observed:

"... If we turn from speculation about legislative intent to the realities of the Railway Labor Act, we are aware that the conferences triggered by Section 6 notices are typically the beginning and not the end of the statutory procedures. If conferences proposed by a Section 6 notice are unavailing either party can invoke the services of the National Mediation Board. *While negotiations continue or the Board has jurisdiction, no self-help is permitted.*

The parties are free to submit their controversy to arbitration. If none of these techniques resolves the matter, the President may convene an emergency board to investigate the dispute and report back on the issues. *Only when all these steps have been exhausted are the parties free to act unilaterally.*" (Emphasis supplied.)

Other cases which support the decision of the court below requiring plaintiff to maintain the *status quo*, are *Butte, Anaconda & Pac. Ry. Co. v. Brotherhood of L. F. & E.*, 168 F. Supp. 911, aff'd. 268 F. (2d) 54 (C.A. 9, 1959); *Baltimore & Ohio R. Co. v. United Railroad Wkrs., etc.*, 271 F. (2d) 87, 90 (C.A. 2, 1959); and *Spokane, Portland & Seattle Ry. Co. v. Order of Railway C. & B.*, 265 F. Supp. 892, 894.

Here as in the court below, Shore Line relies heavily on the case of *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942). The facts and issues in that case are not remotely analogous to those presented here. There was no existing collective bargaining agreement in effect, nor any prior history of bargaining; *the National Mediation Board had not taken jurisdiction; there was not even any pending demand for an agreement on the subject matter of the change put into effect by the carrier*; and the case dealt primarily with statutory minimum wage requirements of the then newly enacted Fair Labor Standards Act.

Moreover, the *Williams* decision seems to have turned to a large extent upon the Court's feeling that the carrier's unilateral action, the promulgation of individual contracts of employment with its red caps, was not controlled by the Railway Labor Act. Thus, the Court said:

"... Because the carrier was, by the act, placed under the duty to exert every effort to make collec-

tive agreements, it does not follow that pending those negotiations, where no collective bargaining agreements are or have been in effect, the carrier cannot exercise its authority to arrange its business relations with its employees in the manner shown in this record. As we have stated in discussing the Jacksonville case, the Railway Labor Act dealt with collective bargaining agreements only and not with the employment of individuals. This conclusion is pertinent in considering the effect of the Dallas request for collective bargaining." (315 U.S., at p. 402.)

This rationale of the *Williams* decision would appear to be of doubtful validity in the light of the companion decisions of this Court, two years later, in *J. I. Case. Co. v. National Lab. Rel. Bd.*, 321 U.S. 332 (1944) and *Order of R. Telegraphers v. Railway Exp. Agency*, 321 U.S. 342 (1944), holding invalid individual employment contracts negotiated in the face of the duty to bargain collectively.

The other decision of this Court cited by petitioner as contrary to the decision below, *Order of Railroad Conductors v. Pitney*, 326 U.S. 561 (1946), did not involve the question of a carrier's right to make unilateral changes during negotiations or mediation pursuant to a union's Section 6 notice, but rather the question of whether existing agreements controlled the subject matter of the changes, so that the carrier could not put them into effect without itself seeking amendment of the existing agreements pursuant to Section 6. As we have noted above, the decision below does not hold that absent a pending major dispute being progressed in accordance with the Act, a carrier may not make operating changes not barred by existing agreements.

Petitioner Shore Line has cited a number of lower federal court decisions where the claimed conflict with the

decision below is similarly without merit when the facts and actual holdings of the courts are examined.

Thus, *Hilbert v. Pennsylvania R. Co.*, 290 F. (2d) 881 (C. A. 7, 1961), and *Rutland Ry. Corp. v. Brotherhood of Locomotive Eng.*, 307 F. (2d) 21 (C.A. 2, 1962), involved minor as well as major disputes. They involved Section 6 notices served by the carrier, not the union, and the changes in working conditions were put into effect by the carriers under a claim that they were permitted under existing agreements, thus creating minor disputes for the National Railroad Adjustment Board. In *Illinois Central R. Co. v. Brotherhood of Railroad Train.*, 398 F. (2d) 973 (C.A. 7, 1968), it appears from the *per curiam* opinion of the Court of Appeals that the end product of the litigation was a remand of the case to the District Court for entry of an appropriate *status quo* order preserving established practices which a statutory arbitration board, Public Law Board No. 79, had found, during the pendency of the appeal, to be as contended by the Brotherhood. And the case of *Southern Ry. Co. v. Brotherhood of Locomotive Firemen, etc.*, 337 F. (2d) 127 (C.A.D.C., 1964), like the *Hilbert* and *Rutland* cases, involved a Section 6 notice by the carrier, and an injunction requiring the carrier to maintain the *status quo* alternatively until the major disputes procedures had been exhausted, or until an award of the National Railroad Adjustment Board might establish, by interpretation of existing agreements, that the carrier could have put the operating changes into effect without seeking amendment of its agreements under Section 6. Again, the case does not hold that a carrier may make unilateral changes in the subject matter of pending negotiation or mediation on a union's Section 6 notice. Finally, the case of *Norfolk & P.B.L.R. Co. v. Brotherhood of Rail. Train.*, 248 F. (2d) 34 (C.A. 4, 1957),

is not in point. It involved a dispute jurisdiction of which had been refused by the Mediation Board, and simply held that it was unlawful for the Brotherhood to strike over what was held to be a minor dispute.

The unreported District Court opinions reproduced in the appendix to Shore Line's petition are similarly unpersuasive because of the factual situations and actual holdings involved.

The statement contained in the Report of the National Mediation Board cited in the Shore Line's petition (pp. 14-15) patently misstates the *status quo* provisions of Section 6 of the Act, gratuitously reading into the statute the limiting phrase "as expressed in agreements" to describe those rates of pay, rules or working conditions which the carriers are prohibited from altering. No such phrase appears in Section 6. Moreover, the statement was not made in connection with any proceeding before the Board, cited no authority, and amounts to no more than a conclusion of the author of the Report on an aspect of the Railway Labor Act over which the Board possesses no adjudicatory authority.

3. The decision below gives effect to the Railway Labor Act's primary purpose of avoiding interruptions to commerce in the railroad industry by placing upon management and labor alike certain mandatory requirements for the orderly settlement of their disputes.

In attempting to demonstrate the importance and far-reaching effect of the decision below, Shore Line argues (Petition, pp. 18-19) that it will interfere with and delay the railroad industry's "operational changes to promote efficiency and safety", and its efforts "to modernize its equipment and automate operations".

In effect these protestations are but an expression of irritation and impatience over the mandatory duty to bargain collectively, subject to "cooling off" periods, which

Congress has seen fit to impose not just on railroads but on industry in general.

The decision below does not operate to "obliterate rights of carriers." What is involved here is merely postponement of action which a carrier wishes to take, in order to permit consummation of the procedures which Congress has said must be followed in major disputes in the railroad industry, without undue influence or pressure being brought to bear by either party, and without frustration of the jurisdiction of the National Mediation Board with respect to the subject matter before it. Upon completion of the statutory procedures without agreement having been reached, either party is of course free to act unilaterally.

It is a well known fact that precipitous changes made by management in rules of employment or working conditions are frequently the cause of serious disputes between labor and management, and lead to strike threats and strike action. An interpretation of the Act which prevents management from changing an existing employment rule, condition or practice when such rule, condition or practice is currently the subject of collective bargaining, is essential to promote and achieve the ultimate purpose that the Congress sought to achieve when it enacted the Railway Labor Act.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

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U.S. SUPREME COURT

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. ~~200~~ 29

THE DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY, Petitioner,

v.

UNITED TRANSPORTATION UNION, et al.,
Respondents.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 900

THE DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY, *Petitioner*,

v.

UNITED TRANSPORTATION UNION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (A. 166-169) is reported at 401 F. 2d 368. The opinion of the District Court on motion to vacate the judgment (A. 157-164) is reported at 267 F. Supp. 572. The original oral opinion of the District Court (A. 142-146) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered October 7, 1968 (A. 170-171). The petition for a writ of certiorari was filed January 4, 1969, and was granted March 3, 1969. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Statutes Involved

The statute principally involved is Section 6 of the Railway Labor Act (45 U.S.C. § 156):

“Carriers and representatives of the employees shall give at least thirty days’ written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.”

Other provisions of the Railway Labor Act involved in the case are printed in Appendix A, pp. 1a-7a, *infra*.

Question Presented

An adjustment board has determined under Section 3 of the Railway Labor Act (45 U.S.C. § 153) that petitioner railroad has the right under its existing collective bargaining contract to establish outlying work assignments. Respondent union does not contest the conclusive effect of that adjudication of the petitioner’s contractual right (Br. Opp. 3). However, upon learning that the railroad in-

tended to exercise its right to establish outlying assignments, the union served a notice under Section 6 of the Act (45 U.S.C. § 156) proposing that the agreement be changed to abrogate that right. The question presented is:

Does Section 6 of the Act prohibit the railroad from establishing outlying assignments during negotiations upon the union's notice—or, more fundamentally, does Section 6 forbid a railroad from taking action allowed under its existing collective bargaining contract during negotiations upon a union proposal to amend the contract to prohibit such action?¹

Statement

Petitioner Detroit and Toledo Shore Line Railroad (Shore Line) instituted this action in order to enjoin a strike threatened by the Brotherhood of Locomotive Firemen and Enginemen (BLF&E)² for the purpose of preventing the Shore Line from establishing two "outlying assignments"³ at Trenton, Michigan (A. 5-11). The BLF&E counterclaimed to enjoin the Shore Line from establishing such assignments (A. 15-16). The District Court dismissed the Shore

¹ Certain passages in respondent's brief in opposition to certiorari suggest the possibility that respondent may argue alternative grounds to support the judgment below. (Br. Opp. 7-8.) If respondent does advance such arguments, we shall respond to them in our reply brief. At this point, we restrict our analysis to the issue upon which certiorari was granted, the only relevant issue litigated in and decided by the courts below.

² Since this case was decided below, the BLF&E has merged with certain other unions representing operating employees—the Brotherhood of Railroad Trainmen (BRT), the Order of Railway Conductors & Brakemen, and the Switchmen's Union of North America—to form the United Transportation Union (UTU). The UTU has been substituted for the BLF&E as the union respondent in this Court (A. 172), but the union respondent is referred to in this brief as the BLF&E because it is so referred to throughout the record.

³ As used herein, the term "outlying assignment" means an assignment with a reporting point for going on and off duty located elsewhere than at petitioner's principal yard in Toledo.

Line's complaint and granted the injunction sought by the BLF&E. The Court of Appeals affirmed. The Shore Line seeks a reversal.

The main line of the Shore Line runs from Lang Yard in Toledo, Ohio, 50 miles north to Dearoad Yard near Detroit and River Rouge, Michigan (A. 27-28, 147). Prior to 1961, Lang Yard was the reporting point for train and engine service crews going on and off duty (A. 148). These crews performed switching both at Lang Yard and at points to the north (A. 27-28), including switching for a number of large customers in the vicinity of Edison Station, Trenton, Michigan, 35 miles north of Lang Yard (A. 19, 27-28, 56, 57, 91-92). This arrangement required payment of considerable overtime to crews going from Lang Yard to the point at which they performed their work (A. 29-30), and contributed to growing congestion at Lang Yard (A. 55-56).

Because of a need to reduce expenditures and an increasing volume of business at Trenton, the Shore Line decided in 1961 to establish outlying assignments at Trenton (A. 29-30, 132, 148, 166). Accordingly, on February 21, 1961, the Shore Line notified the BLF&E and the other unions that represent operating employees of its intention to do so and inquired as to the facilities that would be required for employees going on and off duty at Trenton (A. 132, 148).

The unions responded on April 28, 1961, by serving the Shore Line with a notice pursuant to Section 6 of the Railway Labor Act (45 U.S.C. § 156) requesting negotiation of an agreement with respect to the working conditions of employees affected by the proposed establishment of a new terminal point (A. 30-31, 104, 148). In addition, the unions asked the Shore Line to defer the establishment of the new terminal point long enough to permit them to prepare proposals regarding the matter. The Shore Line agreed to the unions' request (A. 31, 133), the unions prepared detailed

proposals (A. 31, 105-108, 148), and the parties conferred with respect to the proposals. The conferences failed to settle the matter, however (A. 31-32, 135-136, 148).

In consequence, conferences were terminated as of June 5, 1962 (A. 32, 135-136). The unions then invoked the mediatory services of the National Mediation Board (A. 32), but mediation was unsuccessful. Accordingly, the Mediation Board terminated its services and thereafter closed its file on April 3, 1963, two years after the service of the unions' Section 6 notice (A. 32, 109, 138-139, 148-149).

In the meantime, the Shore Line had refrained from establishing a terminal at Trenton. However, in the latter part of 1962, while the parties' dispute was pending in mediation, the Shore Line established two new work assignments originating at Dearoad, near Detroit, eleven miles north of Trenton (A. 19, 32-34, 56). At first, crews reporting at Dearoad ran a locomotive from Dearoad to Trenton to perform switching required at that point. After a time, however, the Shore Line started transporting crews from Dearoad to Trenton by taxi (A. 19, 34). Because of the establishment of the Dearoad assignments, and because the Shore Line had discontinued switching for Monsanto at Trenton pursuant to an alternating annual arrangement with the New York Central, the Shore Line concluded that it no longer needed to establish a terminal at Trenton and so advised the Mediation Board (A. 43, 54-55, 137).

Following the establishment of the Dearoad assignments and the termination of mediation, the Shore Line and the BLF&E made further attempts to negotiate a revision of their collective bargaining contract but were unable to do so (A. 114). The BLF&E then submitted to a Special Board of Adjustment established under Section 3 of the Railway Labor Act (45 U.S.C. § 153) the question whether the establishment of outlying assignments at Dearoad had violated

the parties' existing agreement (A. 34-35, 167)⁴ and notified the Shore Line and the Mediation Board that it was withdrawing the 1961 Section 6 notice because the adjustment board would "in all probability settle the issue of starting and tying up a crew at other than Lang Yard" (A. 114; see also A. 34-35, 63-64, 65, 149). Before the adjustment board, the BLF&E contended that in a previous agreement the Shore Line had limited itself with respect to establishing outside assignments (A. 110).

On November 30, 1965, the adjustment board sustained the Shore Line's contention that its existing agreement permitted the establishment of outlying assignments (A. 35-36, 110, 167). It ruled that "[t]here is nothing in the rules of agreement which precludes this carrier from establishing an outside assignment" (A. 110). It accordingly denied employees' claims based on the establishment of the Dearoad assignments (A. 110). As the Court of Appeals observed, the adjustment board's determination of the parties' "minor dispute" as to the "interpretation of the contract is binding on the parties" under Section 3 of the Railway Labor Act (A. 167 n. 1).⁵

When the adjustment board had confirmed the Shore Line's right under the existing collective agreement to establish outlying work assignments, the Shore Line revived its plan to establish such assignments at Trenton. It did so not only because of the overtime and transportation expense involved in transporting employees to Trenton (see A. 29-30, 55), but also because the amount of switching required

⁴ See also Br. Opp. 3; and Tr., Oct. 7, 1966, pp. 39-40, included in the appendix to plaintiff-appellant's brief in the court below, at 71a-72a.

⁵ See, e.g., *Gunther v. San Diego & A.E.R. Co.*, 382 U.S. 257 (1965). As this Court has stated: "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. . . . The grievance procedure is . . . a part of the continuous collective bargaining process." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 581 (1960).

both at Lang Yard and at Trenton had grown in recent years. In addition to Monsanto, Lever Brothers, Detroit Edison, Schwewnigan, and Niemann's Lumber (A. 28), McLouth Steel had requested service at Trenton (A. 43, 55). According to the Shore Line's General Manager, it simply was "not feasible to operate all of those trains out of Lang" (A. 55); taking an engine out of Lang Yard to perform switching at Trenton had become "more difficult because of the heavier switching operations that we have at Lang" (A. 56).

Accordingly, on January 24, 1966, the Shore Line notified the unions, including the BLF&E, that it intended "to construct welfare facilities at our Trenton Freight Office to accommodate train and engine crews at that location," but that "before doing so" it "felt that all of the parties should be in agreement, if possible, as to the accommodations necessary" (A. 140-141). It therefore invited the unions to inspect the proposed facilities (A. 140-141). On January 27, 1966, the BLF&E responded by serving the Shore Line with a new Section 6 notice, demanding that the existing agreement be amended to provide that "[a]ll road service runs and/or assignments will originate and terminate at Lang yard (Toledo, Ohio)" (A. 112; see also A. 42, 149). That proposed amendment to the agreement would abrogate the Shore Line's right to establish outlying work assignments (A. 149).

The parties conferred but were unable to reach an agreement with respect to the BLF&E demand for a change in the existing contract (A. 115-119). The BLF&E then sought mediation by the Mediation Board (A. 122). On June 28, 1966, the Board docketed the matter but has not yet assigned a mediator (A. 42, 113, 125-129, 149). In the meantime, the Shore Line completed facilities for employees at Trenton (A. 24-25). In October 1966, the Shore Line was required

to resume switching for Monsanto at Trenton, under the alternating annual arrangement with the New York Central (A. 28, 43). That same month it was required to furnish new switching service to McLouth Steel at Trenton (A. 52-53, 55). Accordingly, on September 19, 1966, the Shore Line took the action it had been entitled to take under its agreement but had deferred during five years of negotiations. It posted a bulletin, effective September 26, 1966, establishing two new work assignments originating at Trenton (A. 28, 42-43, 111, 150).

The BLF&E and the BRT then threatened to strike (A. 71-72, 98-99). The Shore Line filed this action to enjoin the threatened strike (A. 3, 150). The BLF&E counterclaimed to enjoin assignments originating at Trenton (A. 15-16). The Shore Line actually operated the Trenton assignments for one day and then transferred them to Dearoad *pendente lite* (A. 43).

The District Court dismissed the Shore Line's complaint⁶ and enjoined the Shore Line from "establishing or operating a terminal point at Edison Station, Trenton, Michigan, or any other terminal point not previously established" until the pending "major" dispute with the BLF&E "has been fully handled to a conclusion" (A. 152-153, 154-155). The injunction was based, notwithstanding the intervening establishment of outlying assignments at Dearoad, on a finding that "[f]or many years prior to 1961, Lang Yard in Toledo, Ohio, was the terminal point, for train and engine crews going on and off duty, from which plaintiff operated to perform switching service for the Monsanto Chemical Company plant at Trenton, Michigan, where no terminal point had

⁶ The District Court dismissed the Shore Line's complaint with respect to the BRT, which had never withdrawn the 1961 notice, on the ground that the BRT was free to strike because it had exhausted "major dispute" procedures with respect to the 1961 notice (A. 151). That determination has not been appealed.

previously been established or operated by plaintiff" (A. 148). On the basis of that finding, the District Court ruled that by establishing assignments at Trenton after the service of the union's most recent Section 6 notice, the Shore Line had violated Section 6 of the Railway Labor Act (45 U.S.C. § 156), which provides that carriers and unions shall give thirty days' notice of "an intended change in agreements affecting rates of pay, rules, or working conditions," and that "[i]n every case where such notice of intended change has been given, . . . rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 5 of this Act, by the Mediation Board . . ." (A. 152-153).⁷

The Shore Line moved for reconsideration. It pointed out that in *Williams v. Terminal Co.*, 315 U.S. 386, 402-403 (1942), this Court had held that under Section 6 the making of a proposal for an agreement "does not change the authority of the carrier" because the "prohibitions of § 6 against change of wages or conditions pending bargaining . . . are aimed at preventing changes in conditions *previously fixed by collective bargaining agreements*" (emphasis added). In addition, the Shore Line pointed out that the National Mediation Board has stated repeatedly, in accordance with this Court's holding in *Williams*, that

⁷ Initially, the District Court concluded that petitioner had violated Section 5 of the Act (45 U.S.C. § 155, p. 5a, *infra*) as well as Section 6 (A. 152). Since 1934, Section 5 has contained a status quo requirement that applies during the thirty-day cooling-off period after the Mediation Board has terminated its services. (48 Stat. 1195 (1934); see *Hearings on S. 3266 before the Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess. (1934), p. 21.) However, the Mediation Board has not terminated its services in this case (A. 149), and therefore the status quo provision in Section 5 is not yet applicable. Moreover, in its Answer and Counterclaim the BLF&E claimed only that petitioner had violated the status quo requirement of Section 6 (A. 14, 15, 16). In these circumstances, the District Court discussed only the application of Section 6 in its opinion denying petitioner's motion to vacate the judgment (A. 161-164), and the Court of Appeals relied on Section 6 alone when it affirmed the judgment (A. 168).

"the serving of a section 6 notice for a new rule or a change in an existing rule does not operate as a bar to carrier actions which are taken under rules currently in effect" i.e., that "section 6 is intended to maintain the contract as it existed between the parties until the provisions of the act have been complied with." NMB, 34th Ann. Rep. 23 (1968). The District Court held, however, that this Court's holding in *Williams* applies only to the rare case in which there is no collective agreement in existence; that the Mediation Board had misinterpreted Section 6; and that rejection of the Mediation Board's interpretation of Section 6 was necessary lest the work of the Mediation Board "be greatly hampered" (A. 162-163).

On appeal, the Sixth Circuit affirmed. The Shore Line contended, as it had in the District Court, that the status quo provision in Section 6 applies only to changes in rates of pay, rules, or working conditions which are embodied in the collective bargaining contract. The Court of Appeals rejected that contention, however, holding it "lacking in merit for the reasons stated in the opinion of the District Judge" (A. 168.)

For the reasons stated below, that holding should be reversed.

Summary of Argument

1. During the three decades since the enactment of the Railway Labor Act in 1926, it has been commonly accepted that under the status quo provision of Section 6 of the Act (45 U.S.C. § 156), the rights and duties of the parties to a "major dispute" over proposed changes in collective bargaining agreements are measured by the parties' pre-existing agreements. What the agreements forbid remains forbidden pending exhaustion of the statutory major dispute procedures. And what the agreements do not forbid remains permissible pending exhaustion of those procedures.

The effect of the status quo provision of Section 6 is simply to extend or prolong the life of agreements pending negotiations for change. See *Manning v. American Airlines, Inc.*, 329 F.2d 32, 34 (2d Cir., 1964); *Brotherhood of Railroad Trainmen v. Akron & B.B. R. Co.*, 385 F.2d 581, 593 (D.C. Cir., 1967).

This generally accepted interpretation of Section 6 has been consistently followed by the National Mediation Board for many years and has been expressed in the Board's instructions to mediators, in its communications to interested parties, and in its annual reports. In such instructions and communications, the Board has stated that Section 6 does not "mean that proposed revisions of agreement rules and the invocation of this Board's services on such proposed changes has the effect of staying the application of existing rules unless and until such existing rules are amended or revised." (See p. 9a, *infra*.) In its annual reports the Mediation Board has stated repeatedly, with respect to the situation following the service of a Section 6 notice "proposing to restrict the right of the carrier to unilaterally act in a certain area," that Section 6 "is intended to maintain the contract as it existed between the parties until the provisions of the act have been complied with. . . . [T]he rights of the parties which they had prior to serving the notice of intention to change remain the same during the period the proposal is under consideration. . . . [T]he serving of a section 6 notice for a new rule or a change in an existing rule does not operate as a bar to carrier actions which are taken under rules currently in effect." NMB, 34th Ann. Rep. 23 (1968). Not only is the long standing interpretation of Section 6 by the Mediation Board entitled to great weight, but it destroys the justification advanced by the District Court for its decision in this case—that "[i]f the carrier can unilaterally change the working conditions of its employees while such con-

ditions are the subject of mediation efforts by the Board the work of the Board would be greatly hampered" (A 162). The Board thinks otherwise.

2. The Mediation Board's interpretation of Section 6 conforms to the understanding of that provision manifested by the uniform rulings of courts with respect to the issue prior to the decision of the District Court in this case. In 1942, this Court held, in *Williams v. Terminal Co.*, 315 U.S. 386 (1942), that the "prohibitions of § 6 against change of wages or conditions pending bargaining . . . are aimed at preventing changes in conditions previously fixed by collective bargaining agreements." 315 U.S., at 402-403; see also *Order of Conductors v. Pitney*, 326 U.S. 561, 565 (1946). That ruling settled the issue, for practical purposes, until the decision below in this case. When the question did arise, as it did on infrequent occasions, the lower courts uniformly followed the holding in *Williams* that Section 6 prohibits changes, pending bargaining, only in conditions previously fixed by contract—that the parties' rights as they existed under pre-existing agreements remain unchanged during negotiations with respect to proposed changes in such agreements. See, e.g., *Southern Ry. Co. v. Brotherhood of Locomotive Firemen, Etc.*, 337 F.2d 127, 132-133 (D.C. Cir., 1964); *Hilbert v. Pennsylvania R. Co.*, 290 F.2d 881, 885 (7th Cir., 1961); *Norfolk & P.B.L. R. Co. v. Brotherhood of Rail. Train.*, 248 F.2d 34, 41 (4th Cir., 1957); *Railway Clerks v. Santa Fe R. Co.*, 50 CCH Lab. Cas. ¶ 19,299 (N.D. Ill., 1964); *Flight Engineers v. Western Air Lines*, 43 CCH Lab. Cas. ¶ 17,064 (S.D. Calif., 1961).

3. The generally accepted understanding of Section 6 followed both by the Mediation Board and by the courts in previous Railway Labor Act cases was clearly correct, in view of the manifest intent of the Congress evidenced in the text and scheme of the Railway Labor Act and

confirmed by the legislative history of the enactment. From the initial statutory prescription of the parties' basic duty under the Act—"to exert every reasonable effort to make and maintain agreements" (45 U.S.C. § 152 First)—throughout the detailed procedural provisions of the Act, the Act evidences an intent that the agreements of railroads and unions should govern their rights and obligations, rather than any scheme fashioned and imposed by the Congress. This intent was made explicit in extensive testimony by the railroad and union representatives who presented the proposed legislation to the Congress, Donald Richberg for the unions and Alfred Thom for the railroads. Richberg testified in support of the Act, for example, that "[c]ontract is the foundation of all our successful relations . . . [a]nd that we seek to preserve in here," while Thom testified that the first "leading principle" of the proposed legislation was that "the relationship of the parties shall be controlled by agreements." *Hearings on H.R. 7180 before the House Committee on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. (1926), pp. 16, 113. In view of the statutory scheme and its history, it cannot reasonably be claimed that Congress intended in Section 6 to provide a vehicle by which the union and railroad parties to a collective bargaining agreement might obliterate each other's rights as they exist under the agreement simply by serving each other with proposals to change the agreement.

4. Moreover, if it is permitted to stand, the decision below will have thoroughly undesirable consequences for railroad operations and railway labor relations. The decision below would allow union general chairmen to block operational changes whenever they see fit to do so. Railroads must continue to change if they are to serve the public as they should. Moreover, just as the decision below would permit the unilateral destruction of carriers' rights, so too it would sanction unilateral destruction of employees'

rights. More fundamentally, the decision below would encourage the service of Section 6 notices not for the purpose of obtaining agreements but simply to prevent change of one kind or another—to destroy existing rights. That would lead to stultification of the collective bargaining process. As union representatives have testified, “everyone knows” that “a proposal under the Railway Labor Act is the starting point, not the end, of collective bargaining.” (Testimony of Lester Schoene, *Hearings on S. 3548 before the Special Subcommittee of the Senate Committee on the Judiciary*, 86th Cong., 2d Sess. (1960), p. 186.) The decision below would turn the Act upside down by making the service of a Section 6 notice serve ends in itself.

Argument

The decision below permits a union, simply by serving a Section 6 notice, to obliterate a carrier's rights as they exist under pre-existing agreements for as long as it takes the parties to exhaust statutory procedures that are “purposely long and drawn out.” *Railway Clerks v. Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966). Yet, as this Court has stated, the Railway Labor Act was not designed to permit a party to achieve “unilaterally . . . what the Act requires be done by the other orderly procedures.” *Id.*, at 247. The decision below is contrary to the commonly accepted understanding of Section 6 and to the intent of the Congress and if permitted to stand will have intolerable effects on railroad operations and labor relations.

1. *The decision below is contrary to the commonly accepted understanding of Section 6 reflected in communications, instructions and reports of the National Mediation Board.*

During the three decades since the enactment of the Railway Labor Act in 1926 it has been generally understood

that under the status quo provision of Section 6 of the Act (45 U.S.C. § 156), the rights and duties of the parties to a "major dispute" over proposed changes in collective bargaining agreements are measured by the parties' pre-existing agreements. When the Congress provided that the parties must give notice of any change "in agreements affecting rates of pay, rules, or working conditions," and that "where such notice" is given "rates of pay, rules, or working conditions shall not be altered" pending negotiations, the Congress meant that the parties' contracts should continue to govern their rights and duties pending exhaustion of the major dispute procedures with respect to proposals to change those contracts. The purpose of Section 6 was not to suspend or destroy rights and obligations as the parties had seen fit to arrange them, but rather to prolong or extend agreements during the time it takes to exhaust "purposely long and drawn out" major dispute procedures prescribed by Sections 5 through 10 of the Act (45 U.S.C. §§ 155-160). See *Manning v. American Airlines, Inc.*, 329 F.2d 32, 34 (2d Cir., 1964); *Brotherhood of Railroad Trainmen v. Akron & B.B.R. Co.*, 385 F.2d 581, 593 (D.C. Cir., 1967).

This general understanding of the effect of Section 6 has been followed by the National Mediation Board for years and has been expressed in the Board's reports, in communications to interested parties, and in instructions to mediators. Thus, the reports of the Mediation Board have stated:

"Another type of situation involves the case where an organization serves a proper section 6 notice on the carrier proposing to restrict the right of the carrier to unilaterally act in a certain area. Handling of the proposal through various stages of the Railway Labor Act has not been completed when complaints will sometimes be made that the carrier is not observing the

'status quo' provisions of section 6 when it institutes an action which would be contrary to the agreement if the proposed section 6 notice had at that time been accepted by both parties.

"Section 6 states that where notice of intended change in an agreement has been given, rates of pay, rules, and working conditions as expressed in the agreement shall not be altered by the carrier until the controversy has been finally acted upon in accordance with specified procedures. Positively stated, section 6 is intended to maintain the contract as it existed between the parties until the provisions of the act have been complied with. When the procedures of the act have been exhausted without an agreement between the parties on the 30-day notice of intended change, the carrier may alter the contract to the extent indicated in the 30-day notice, and the organization is free to take such action as it deems advisable under the circumstances. The other provisions of the contract are not affected and remain unchanged. In brief, *the rights of the parties which they had prior to serving the notice of intention to change remain the same during the period the proposal is under consideration, and remain so until the proposal is finally acted upon. The Board has stated in instances of this kind that the serving of a section 6 notice for a new rule or a change in an existing rule does not operate as a bar to carrier actions which are taken under rules currently in effect.*" NMB, 34th Ann. Rep. 23 (1968) (emphasis added).⁸

⁸ Accord, NMB, 33d Ann. Rep. 36 (1968); 32d Ann. Rep. 29 (1967); 31st Ann. Rep. 25 (1966); 30th Ann. Rep. 29 (1964); 29th Ann. Rep. 32 (1963); 28th Ann. Rep. 28 (1962); 27th Ann. Rep. 32 (1961); see also Award No. 293, Special Board of Adjustment No. 465, September 12, 1966, Pet. App. 38a-39a.

As the Mediation Board indicated in the foregoing passage from its most recent annual report, it has frequently faced the question presented by this case in performing its statutory duties. Thus, in 1960 the Board issued instructions to mediators in which it set forth its interpretation of the status quo provision in Section 6. See Appendix B, pp. 8a-11a, *infra*. Those instructions quoted the Board's rejection of a complaint that a railroad had violated its obligation to maintain the "status quo" by changing "territorial limits and assignments" following the service of a Section 6 notice regarding the matter (p. 9a, *infra*):

"The Board considered your letter of August 10, 1956 in Executive Session on August 16, 1956. The Carrier has taken the position that the proposed rearrangement of sections and the consequent changes in forces are permissible under the present agreement, and if a dispute exists as to the application of the present rules it should be taken before the National Railroad Adjustment Board.

"The National Mediation Board does not understand Section 6 of the Railway Labor Act to mean that proposed revisions of agreement rules and the invocation of this Board's services on such proposed changes has the effect of staying the application of existing rules unless and until such existing rules are amended or revised.

"In view of the language of Section 2, Seventh of the Railway Labor Act stating 'No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this act.', the Board fails to find any basis for complying with your request."

The Mediation Board's consistent interpretation of Section 6 is entitled to great weight in construing the statute. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965); see also 1 Davis, *Administrative Law Treatise* § 5.06 (1958). The Board's consistent interpretation also destroys the justification advanced by the District Court in support of its ruling in this case—that "[i]f the carrier can unilaterally change the working conditions of its employees while such conditions are the subject of mediation efforts by the [Mediation] Board, the work of the Board would be greatly hampered." (A. 162.) The Board itself thinks otherwise.

2. *The decision below is contrary to virtually all previous Railway Labor Act decisions with respect to the question presented.*

The Mediation Board's interpretation of Section 6 conforms to the understanding of that provision manifested in the uniform judicial decisions with respect to the question prior to this case. The first, leading, and in this case controlling, decision was this Court's decision in *Williams v. Terminal Co.*, 315 U.S. 386, 401-403 (1942).⁹ In that case, redcaps at the Dallas Union Terminal, who previously had been unrepresented, selected the Clerks' union as their collective bargaining representative. The union then served the Terminal with a request "for a conference to negotiate an agreement for working conditions and other related subjects. . . ." 315 U.S., at 402. For at least thirteen years before that, redcaps had been permitted to keep their tips without accounting for them to the Terminal. 33 F. Supp.

⁹ The relevant portion of the *Williams* decision is the portion relating to *Pickett v. Union Terminal Co.*, No. 1023, O.T. 1940.

244, at 248. While the request for a contract was pending, however, the Fair Labor Standards Act became effective. The Terminal notified the redcaps that henceforth they would be required to account for their tips and the Terminal would pay them the difference between the tips and the statutory minimum wage. The redcaps contended that the Terminal had changed their rates of pay and working conditions in violation of Sections 2 Seventh¹⁰ and 6 of the Railway Labor Act. This Court rejected that contention, holding that:

"The institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibitions of § 6 against change of wages or conditions pending bargaining and those of § 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agreements. Arrangements made after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose." 315 U.S., at 402-403.

The decision below—that Section 6 prohibits changes following the service of a Section 6 notice even when the carrier's right to make the changes under the parties' pre-existing agreements has been confirmed by an adjustment

¹⁰ Section 2 Seventh provides that "[n]o carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act" (45 U.S.C. § 152 Seventh, p. 2a, *infra*). This provision does not bar a carrier from changing rates of pay, rules, or working conditions which are not embodied in agreements. *Illinois Central R. Co. v. Brotherhood of Loc. Fire. & Eng.*, 332 F.2d 850 (7th Cir., 1964); *St. Louis, S.F.&T.Ry. Co. v. Railroad Yardmasters*, 328 F.2d 749 (5th Cir., 1964); *Locomotive Firemen v. New Haven Railroad*, 59 CCH Lab. Cas. ¶ 13,217 (D. Conn., 1968).

board and therefore cannot be disputed—is contrary to the unqualified holding in *Williams*. The District Court was of the view that the holding in *Williams* applies only to cases in which the parties do not yet have a collective bargaining contract—the situation in *Williams*. (See A. 163.) But that is a fact about *Williams* that looks the other way. As this Court stated, “[a]rrangements made after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose.” 315 U.S., at 403. Therefore, the rights of a carrier *after* the parties have entered into a collective bargaining contract (as in this case) should be entitled to more, not less, protection than the rights of a carrier before there is any contract. The decision of the adjustment board (pp. 5-6, *supra*; A. 110) established conclusively that under its existing agreements the Shore Line had the right to establish outlying assignments.

Moreover, the District Court’s notion that *Williams* is distinguishable on the ground that Section 6 is not applicable where a party wishes to establish an agreement for the first time rather than to change a pre-existing agreement is at war both with this Court’s well established view respecting the scope of Section 6 and with the plain purpose of that provision. In its landmark exposition of the Railway Labor Act in *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 723 (1945), this Court indicated that a proposal to make an agreement where, to use the District Court’s phrase in the case at bar, “there [is] no agreement in existence to change” (A. 163) is a request for a “change in agreements” within the meaning of Section 6. Thus, the Court explained that the “major” dispute procedures of the Act relate “to disputes over the *formation* of collective agreements or *efforts to secure them*,” and that such disputes “*arise where there is no such agreement or*

where it is sought to change the terms of one . . .” (emphasis added). If that were not so—that is, if the District Court’s basis for distinguishing *Williams* were correct—a union could strike to obtain an agreement without first exhausting the major dispute procedures in the absence of a pre-existing agreement, something Congress obviously did not intend when it enacted the Railway Labor Act “to provide a machinery to prevent strikes,” *Texas & N.O.R. Co. v. Ry. Clerks*, 281 U.S. 548, 565 (1930). That conclusion is confirmed by legislative history which demonstrates that Section 6 was intended to apply to requests for new agreements as well as to requests for the revision of existing agreements. For example, the union’s representative, Donald Richberg, testified that the provisions that were later incorporated in Section 6 would “provide the means for obtaining and changing agreements and for adjusting disputes arising under agreements. . . .” *Hearings on S. 2646 before the Senate Committee on Interstate Commerce*, 68th Cong., 1st Sess. (1924), p. 18 (emphasis added). Similarly, the railroads’ representative, Alfred Thom, described the kind of dispute that would be subject to Section 6 as a dispute that “relates to changes in rates of pay, rules, or working conditions, to new agreements with respect to these matters. . . .” *Hearings on S. 2306 before the Senate Committee on Interstate Commerce*, 69th Cong., 1st Sess. (1926), pp. 10-11 (emphasis added). For these reasons, the redcaps’ written demand for a collective bargaining agreement in *Williams* was sufficient to invoke the procedures of Section 6 and thus to bring into play the status quo requirements of Section 6. See 316 U.S., at 402-403; cf. *Pullman Co. v. Order of Ry. Conductors & Brakemen*, 316 F.2d 556, 562 (7th Cir., 1963). What the Court held in *Williams* was not that Section 6 does not apply in the absence of a prior agreement, as the District Court believed,

but that the carriers' action had not violated Section 6 because it had not violated an existing agreement. 315 U.S., at 402-403.

Until this case, *Williams* settled the question presented. Accordingly, until very recently there has been little additional litigation with respect to the matter. This Court itself has never retreated from its holding in *Williams*. On the contrary, in *Order of Conductors v. Pitney*, 326 U.S. 561, 565 (1946), it reiterated the view that "the only conduct which would violate § 6 is a change of those working conditions which are 'embodied' in agreements." And all lower courts that encountered the issue, prior to this case, likewise decided it in accordance with this Court's ruling in *Williams* and thus are squarely opposed to the decision below.

For example, the understanding of Section 6 expressed in the *Williams* decision underlies the decision of the District of Columbia Circuit in *Southern Ry. Co. v. Brotherhood of Locomotive Firemen, Etc.*, 337 F.2d 127 (D.C. Cir., 1964). In that case the Southern served the BLF&E with a notice proposing the abrogation of rules requiring assignment of firemen to diesel locomotives. 337 F.2d, at 130. For years the collective agreement had provided that "[a] fireman . . . shall be employed on all locomotives," and, accordingly, the Southern had assigned firemen to all locomotives including diesel locomotives. 337 F.2d, at 129. However, it began operating diesel locomotives without firemen, claiming that the existing agreement required only that it employ firemen on such locomotives when there were firemen available who were on the seniority roster when the agreement was made. The BLF&E sought an injunction against operation of locomotives without firemen

"... because the Section 6 notice served by Southern, proposing to change the existing agreement with re-

spect to use of firemen on locomotives, was still pending before the National Mediation Board and Section 6 of the Railway Labor Act prevented the change in working conditions involved in operating trains without firemen in such circumstances." 337 F. 2d, at 131.

The District Court granted injunctive relief, and the Court of Appeals affirmed. The Court of Appeals reasoned that to allow "a change in the long-standing interpretation . . . which had been given by the parties to the existing contract" would "in substance and effect change the contract itself." 337 F. 2d, at 132. However, the Court went on to hold—and this is the salient aspect of the decision for present purposes—that the injunction could not remain in effect if an adjustment board were to determine that operation of diesels without firemen was permissible under the existing agreement:

"[W]e think that the District Court properly ordered . . . that the injunction will remain effective until either the NRAB interprets the contract in Southern's favor or until the contract is modified or changed under the Railway Labor Act. The NRAB of course is not ordinarily concerned with Section 6 proposals, but here the contract change proposed under Section 6 would be put into effect immediately by the change in the long-standing prior interpretation and application of the old contract. To be effective and to effectuate the command of Section 6, the injunction under the Section 6 claim must, pending exhaustion of the statutory processes for negotiation of a new contract under the Act, properly preclude such a change in interpretation until such change is authorized by the NRAB, even granting that ordinarily the change could not be enjoined." 337 F. 2d, at 132-133.

In short, notwithstanding the carrier's long-established practice, the Court of Appeals held that the injunction against the operation of diesels without firemen could not remain in effect if an adjustment board determined that such operation was permitted by the existing agreement. That ruling accorded with the Mediation Board's interpretation of Section 6 and this Court's ruling in *Williams*. But in the case now before this Court, the Sixth Circuit affirmed an injunction against the establishment of outlying assignments *after* an adjustment board had determined conclusively that the establishment of such assignments is permitted by the existing agreement.

The understanding of Section 6 confirmed by this Court's decision in *Williams* likewise underlies the Seventh Circuit's decision in *Hilbert v. Pennsylvania R. Co.*, 290 F.2d 881 (7th Cir., 1961). In that case, the Seventh Circuit held that a railroad's right to change the location of crew terminals, following the service of a notice proposing modification of existing agreements with respect to the matter (see 290 F.2d, at 885; 307 F.2d, at 24-25 n. 1), turned on whether such changes were permissible under the applicable rule established by the existing agreements—"[t]hat rule remains in effect." 290 F.2d, at 885. More recently, in *Illinois Central R. Co. v. Brotherhood of Railroad Train.*, 398 F.2d 973 (7th Cir., 1968), the Seventh Circuit approved a holding that a railroad's right to reduce the number of trainmen assigned to certain crews, following the service of a notice proposing a prohibition of such reductions (398 F.2d, at 975 n. 2), depended on whether the reductions were permitted by rules already in existence. 398 F.2d, at 975, 979. See also *Rutland Ry. Corp. v. Brotherhood of Locomotive Eng.*, 307 F.2d 21 (2d Cir., 1962), *reversing* 188 F. Supp. 721 (D. Vt., 1960), in which the Second Circuit reached conclusions similar to those of the Seventh Circuit

in *Hilbert*. In each of these cases, the unions were denied injunctive relief sought on the basis of Section 6 in the absence of an adjustment board determination that the carrier's actions were *prohibited* by existing rules. 290 F.2d, at 882, 885-886; 398 F.2d, at 975, 979; 188 F. Supp., at 723, 728. In the case now before this Court, however, the union was granted such relief *notwithstanding* an adjustment board determination that the carrier's actions were *permitted* by existing rules."¹¹

The Fourth Circuit likewise has had occasion to express its adherence to the interpretation of Section 6 endorsed in this Court's decision in *Williams*. In *Norfolk & P.B.L.R. Co. v. Brotherhood of Rail. Train.*, 248 F.2d 34 (4th Cir., 1957), the Fourth Circuit said:

¹¹ In its brief in opposition (p. 12), the BLF&E contended that these decisions are not in point because they "involved minor as well as major disputes." In each case the parties disagreed as to whether the carrier's actions were permitted by existing rules. Thus, in addition to the major dispute created by the service of a Section 6 notice proposing a change in the applicable agreement, each case also involved a minor dispute as to the interpretation of the agreement. So, too, in the instant case, there once was a minor dispute between the parties as to the Shore Line's right under the existing agreement to establish outlying assignments. That dispute has now been determined, in the Shore Line's favor, and it is conceded that the existing agreement does not prohibit the establishment of such assignments. (See pp. 5-6, *supra*; A. 110.) The Shore Line's victory before the adjustment board obviously does not *weaken* the Shore Line's right to establish outlying assignments. Accordingly, the absence of a minor dispute does not serve to distinguish the Shore Line's case; it makes it *a fortiori*.

It should be noted that in *Hilbert* the union not only was denied a status quo order based on Section 6 (the aspect of the case that is relevant here) but it was also denied a status quo order based on *Locomotive Engineers v. M.-K.-T. R. Co.*, 363 U.S. 528 (1960)—*i.e.*, an order prohibiting carrier action pending determination of the parties' minor dispute. See 290 F.2d, at 885. In the *Illinois Central* case, on the other hand, the court required the carrier to preserve the "status quo" pending a determination of the parties' minor dispute; an adjustment board eventually determined that dispute in the union's favor; and at that point entry of a status quo order based on Section 6 was quite properly held to be appropriate. See 398 F.2d, at 975, 976, 979.

"... the prohibitions of [Sections 2 Seventh and fall short of unilateral changes made in accordance with the terms of the applicable agreements and limited to changes in those working conditions which are embodied in the agreement. See *Williams v. Jacksonville Terminal Company*. . . ." 248 F.2d, at 41.

So too, in decisions set forth in the Appendix to our Petition for Certiorari, a number of District Courts have construed Section 6 in accordance with this Court's decision in *Williams*. For example, in *Railway Clerks v. Santa Fe R. Co.*, 50 CCH Lab. Cas. ¶ 19,299 (N.D. Ill. 1964), Pet. App. 40a-46a, the District Court ruled that the "fact that the Clerks have demanded from Santa Fe, in notice duly served under Section 6 . . . , a rule which would limit Santa Fe's right to abolish positions under any circumstances can have no effect on the rights of Santa Fe and the Clerks unless and until such rule actually becomes a part of the agreement between them." (Pet. App. 45a.) And in *Flight Engineers v. Western Air Lines*, 43 CCH Lab. Cas. ¶ 17,064 (S.D. Calif., 1961), Pet. App. 47a-55a, in which an airline had changed the qualifications required of flight engineers during the pendency of a Section 6 notice, the District Court held that the airline had not violated Section 6 because

"... the prohibitions of Section 6 against changes in rules or working conditions pending bargaining . . . apply only to rules and working conditions previously fixed by collective bargaining agreements. *Williams v. Jacksonville Terminal Co.* . . ." (Pet. App. 54a-55a.)

See, also, *Brotherhood of Railroad Trainmen v. Illinois Terminal R. Co.*, No. 66 C 96 (3), E. D. Mo., May 24, 1966 (unreported), Pet. App. 56a-59a; and *Transportation Communication Employees Union v. Illinois Central R. Co.*, Civ.

No. 4192, S.D. Miss., Oct. 4, 1967 (unreported), Pet. App. 60a-63a.¹²

¹² In dissenting in *Rutland Ry. Corp. v. Brotherhood of Locomotive Eng.*, *supra*, 367 F.2d, at 42, Mr. Justice, then Judge, Marshall, in a footnote, expressed in general terms the view that the "preferable" construction of Section 6 is that "changes in existing conditions which are the subject of a major dispute are forbidden whether or not they are arguably authorized by the collective agreement," while observing that a contrary view was "arguable." *Id.*, at 44, n. 11. As we read the dissent, however, it dealt fundamentally with the fairness of the Rutland's conduct in the circumstances of the case. The basic thrust of the dissent was that where the carrier serves a Section 6 notice to change an existing agreement, it may not thereafter take action in reliance upon that existing agreement but rather must abide the outcome of negotiations under the statutory major dispute provisions. Thus, the dissent stated that "[t]he reliance placed by Rutland . . . upon the collective agreement is utterly inconsistent with the [carrier's] Section 6 notice, for Rutland intended by that notice to terminate and do away with the very same contractual provisions which are now so strenuously relied upon. . . . I dare say that if this were a commercial contract with a 30 day termination provision, we would not show such solicitude for one who invoked the termination procedure but later claimed the agreement was still in effect when the other party refused to meet his demands for a new contract." *Id.*, at 46. In addition, the dissent focused upon the consideration that the rights claimed under the contract were only arguably authorized. *Id.*, at 44-46. In the case at bar, of course, it is the union, not the carrier, that has attempted to change the existing agreement; and the decision of the adjustment board has confirmed that the carrier's contractual right was not "arguably authorized," but was authorized.

The oral opinion in *Spokane, Portland & Seattle R. Co. v. Order of Railway C. & B.*, 265 F.Supp. 892 (D.D.C., 1967), rendered after the decision of the District Court in the case at bar, contained statements that appear to conflict with the generally accepted interpretation of Section 6 described in the text above. However, the conflicting implications of that opinion were negated by the District Court when it entered its order pursuant to the opinion (Pet. App. 64a-67a). More recently, in a case in the Northern District of Illinois, a District Court rendered a decision that goes even farther than did the decision below: *Illinois Central R. Co. v. Brotherhood of Locomotive Engineers*, No. 68 C 1382, Apr. 24, 1969 (N.D. Ill.). In that case, the District Court held that after the service of a Section 6 notice proposing an agreement banning the training of certain personnel in the operation of locomotives, a railroad was obliged to discontinue such training even though the training program had been instituted before the service of the Section 6 notice and even though the railroad claimed the existing agreement did not restrict its right to institute the program. As we read it, that decision nullifies the express provision of Section 2 Seventh limiting the obligations of a carrier in this regard, prior to service of a Section 6 notice, to refraining from changing "rates of pay, rules, or working conditions . . . as embodied in agreements." See p. 19, n. 10, *supra*.

In sum, the decision below is flatly contrary to the commonly accepted understanding of Section 6 reflected for years in Mediation Board communications, instructions and reports and in numerous judicial decisions beginning with this Court's decision in *Williams*.

3. The decision below is contrary to the intent of the Congress manifested in the text and scheme of the Railway Labor Act and confirmed by its legislative history.

Neither the terms of the Railway Labor Act nor its legislative history afford any justification for the departure in this case from the commonly accepted understanding of Section 6. On the contrary, the wording of Section 6, the scheme of the Act and the legislative history all confirm the correctness of that understanding. They demonstrate that the decision below is contrary to the intent of the Congress.

The theory of the decision below apparently was that on the day that respondent served its Section 6 notice, the fact that only Lang Yard and Dearoad were reporting points was among the "working conditions" of the employees for purposes of Section 6. Two months before the notice was served, however, the adjustment board confirmed that under the parties' existing agreement the Shore Line could designate any point as a reporting point. Thus, on the day that respondent served its Section 6 notice, Shore Line employees worked subject to the railroad's right to change reporting points. In that sense, those were the "conditions" under which the employees worked.

Thus, the question is whether the "working conditions" frozen by Section 6 are those more-or-less transitory conditions that happened to prevail in the application of the parties' agreement on the particular day that a Section 6 notice is served, or those more fundamental relationships created by the parties' agreement which the Mediation Board refers to as the parties' "rights." (See p. 16, *supra*.)

As is perhaps generally the case with statutes involved in litigation that reaches this Court, the language of Section 6 was not tooled with such precision as to provide an inescapably clear answer to this question. The difficulty arises from the fact that Congress, in the status quo sentence of Section 6, did not explicitly define *what* "rates of pay, rules, or working conditions" were to be maintained during exhaustion of the major disputes procedures of the Act. Yet *some* limitation must be interpolated, for no one suggests that service of any Section 6 notice respecting *any* subject serves to freeze *all* "rates of pay, rules, or working conditions" no matter how unrelated to the notice.

The question, then, is whether other language in Section 6, other provisions in the statute, and legislative history tell us what sort of "rates of pay, rules, or working conditions" the Congress had in mind. We think it clear that they do. We begin with Section 6 itself. An important guide to legislative intent is found in the first sentence of that section, which defines the circumstances in which the various provisions of Section 6 are applicable. The first sentence provides that the parties must give thirty days' "notice of an intended change *in agreements* affecting rates of pay, rules, or working conditions . . ." (45 U.S.C. § 156) (emphasis added). The second sentence—the status quo provision—then refers back to the first sentence in defining the status quo obligation. The second sentence provides that "in every case where *such* notice of intended change has been given"—that is, in every case where "notice of an intended change *in agreements* affecting rates of pay, rules, or working conditions" has been given—"rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . ." (45 U.S.C. § 156) (emphasis added). In this context, the most reasonable reading of that provision is that the parties are not to change "rates of pay, rules, or working conditions" *as affected by the agreement sought*

to be changed—a natural carrying over of the related language in the first sentence of Section 6 referring to changes “in agreements affecting rates of pay, rules, or working conditions.” If the Congress intended a different limitation—namely, if the Congress meant that all “rates of pay, rules, or working conditions” are to be frozen so long as they fall within the general subject matter of the agreement and happen to exist at the time of service of the notice even though subject to change under the agreement—the language it chose was singularly inapt to express that intent.

In this case, in view of the adjustment board decision (pp. 5-6, *supra*; A. 110), it is perfectly clear that the parties’ agreements affect reporting points in only one way: under the parties’ agreements the Shore Line is free to establish reporting points wherever it deems it advisable. The Shore Line’s actions have not altered that situation. The Shore Line’s actions, accordingly, did not violate the status quo provision of Section 6.

This conclusion is confirmed when one looks beyond the terms of Section 6 itself. The ruling below, impairing as it does rights derived under collective bargaining agreements, is at war with the central policy of the Act—the establishment and protection of such agreements. Thus, as this Court observed this past term, the “heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor, ‘to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions. . . .’” *Trainmen v. Terminal Co.*, No. 69, O.T. 1968, slip opinion, p. 8. Section 2 Seventh of the Act (added to the Act in 1934) provides, accordingly, that “no carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 . . .” (45 U.S.C.

§ 152 Seventh) (emphasis added). Consistently with that primary obligation, Section 6 provides for service of a notice of "an intended change in *agreements*" (45 U.S.C. § 156) (emphasis added). Following the service of such a notice,

"The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10." *Trainmen v. Terminal Co.*, *supra*, slip opinion, at 8.

In short, the making and maintaining of *agreements* is the central objective of an elaborate statutory scheme for handling "major" disputes.

In view of that statutory scheme, it would be startling to discover that the Congress had provided that one party or the other to a collective bargaining agreement could alter the parties' respective rights, as they exist under that agreement, simply by serving a proposal to change the agreement. The Congress intended no such thing. It intended the contract to govern the parties' rights and duties

until they either agree to its modification or exhaust the statutory procedures designed to produce agreement. That is the function of the status quo provision of Section 6—to preserve the contract after the contract itself has expired and after the expiration of the thirty-day notice period prescribed by Section 6, pending exhaustion of major dispute procedures with respect to any proposed change in the contract. “The very purpose of § 6 is to stabilize relations by artificially extending the lives of agreements for a limited period regardless of the parties’ intentions.” *Manning v. American Airlines, Inc.*, *supra*, 329 F.2d, at 34; *Brotherhood of Railroad Trainmen v. Akron & B.B.R. Co.*, *supra*, 385 F.2d, at 593.¹³

This view is confirmed by the legislative history of the Railway Labor Act. As enacted in 1926, the Act was drafted and agreed to by representatives of the railroads and the unions.¹⁴ Section 6 of the Act, however, was taken almost verbatim from Section 6(A) of the Howell-Barkley bill of 1924-1925.¹⁵ During the hearings on that bill—which was

¹³ This, of course, is the answer to any contention that under our construction of Section 6, Section 6 adds nothing to the contract. On the contrary, under our construction of Section 6, the status quo provision of Section 6 serves the extremely important purpose of prolonging “agreements subject to its provisions regardless of what they say as to termination.” *Manning v. American Airlines, Inc.*, *supra*, 329 F.2d, at 34; *Brotherhood of Railroad Trainmen v. Akron & B. B. R. Co.*, *supra*, 385 F.2d, at 593.

¹⁴ See S. Rep. No. 606, 69th Cong., 1st Sess. (1926), pp. 2, 6; S. Rep. No. 222, 69th Cong., 1st Sess. (1926), pp. 2, 6; H.R. Rep. No. 328, 69th Cong., 1st Sess. (1926), pp. 1-3.

¹⁵ S. 2646, 68th Cong., 1st Sess.; H.R. 7358, 68th Cong., 1st Sess. (printed in 65 Cong. Rec. 7883). Section 6(A) provided: “(A) Carriers and the representatives of the employees or subordinate officials shall give at least 30 days’ written notice of an intended change affecting rates of pay, rules or working conditions, and the time and place for conference between the representatives of the parties interested in such intended change shall be agreed upon within 10 days after the expiration of said notice, and said time shall be within 20 days after the expiration of said notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Board of

supported by the unions but opposed by the railroads—the unions' principal spokesman, Donald Richberg, explained what later became Section 6 of the Railway Labor Act in detail. Richberg was introduced to the Senate Committee on Commerce, before which he testified at length, by D. B. Robertson, the BLF&E's President at the time. Robertson told the Committee, during hearings on the measure,¹⁶ that

“ . . . This bill simply presents an industrial code for the railroads made up from the written and unwritten laws that have governed industrial relations on the railroads for many years.

“The basis of these relations lie in agreements arrived at through collective bargaining . . .” 1924 *Senate Hearings*, p. 16.

Richberg then proceeded to explain the fundamental importance of the parties' agreements in the scheme envisaged by the draftsmen of the measure. His explanation leaves no room for doubt that the proponents intended that the parties' contracts should continue to govern the parties' rights during the period of conferences and mediation covered by the proposed Section 6(A). Richberg testified:

“Now, just a word as to the fundamentals, because I think the atmosphere of this law is the most important part of its consideration.

“It is recognized that the good order of society rests upon contract, that democratic government enforces

Mediation and Conciliation have been requested by either party, or said board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as herein required by section 5, by the Board of Mediation and Conciliation, unless a period of 10 days has elapsed after termination of conferences without request for or proffer of the services of the Board of Mediation and Conciliation.”

¹⁶ *Hearings on S. 2646 before the Senate Committee on Interstate Commerce*, 68th Cong., 1st Sess. (1924), hereinafter referred to as 1924 *Senate Hearings*.

primarily the voluntary obligations of a man to his fellow man or to the community. The rights of minorities are protected by the agreement of majorities and the will of majorities is enforced through the expressed or implied agreement of minorities to obey majority rules. Any other theory of government is autocratic or anarchistic.

"Therefore any compulsion exerted by Government in a democracy must be based on contract. The mutual obligations of employer and employee which are to be enforced by law must be obligations that arise out of the voluntary agreements of employer and employee. Thus we find that employers and employees have a duty to society and to the Government, as well as to themselves, to 'exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes arising out of the application of said agreements.' I am now quoting from the bill. The statement of this duty in the language just quoted from section 2 is the foundation principle of the railway labor act.

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"After establishing this fundamental obligation, it becomes necessary to provide the means for obtaining and changing agreements and for adjusting disputes arising under agreements. . . .

.

"Changes of agreements: An agreement that can be changed without notice is really no agreement at all. Certainly the power on the one hand and fear on the other hand of arbitrary change will breed discord, not harmony. Therefore it is provided in section 6 that

either party 'shall give at least 30 days' written notice of an intended change' and that a time and place of conference shall be agreed upon. Thereafter a change is prohibited until the machinery for peaceful adjustment has been fully utilized. . . ." 1924 *Senate Hearings*, pp. 17-20.

Richberg went on to make clear that, rather than suspend the parties' agreements during negotiations, the intended effect of proposed Section 6(A) would be to extend or prolong those agreements until the statutory procedures had been completed:

"This prohibition against arbitrary action is a clear necessity in founding industrial peace upon contractual obligations. While an agreement is in force, of course, it should not be changed without consent. If an agreement is about to expire then either party desiring a change should be required to give ample opportunity for negotiation of a new agreement.

"The purpose of this provision is, as you will see, to prevent a situation drifting up to the date of expiration of an agreement and then peremptorily demanding, the one side or the other, a change in the agreement. Under the provisions of this bill, if either side wants a change, since 30 days' notice must be given if they want a change to take place at the end of the existing agreement, they must start negotiations beforehand.

* * * * *

"... [T]he employees, as an organized group, can not under the provisions of this act repudiate a con-

tract and attempt to enforce a change by arbitrary action. . . .

“Senator DILL. And if at the end of the year neither side gives notice, it is your understanding, under this law, the contract would continue for another year?

“Mr. RICHBERG. No; my understanding is it would continue until a change was brought about; that is, it would continue somewhat like holding over under a lease that had expired. There being no other agreement negotiated, it would be further extended.

“Mr. ROBERTSON. I might supplement that by saying that the agreement to arbitrate provides that both parties agree as to the length of time the award will remain in effect. The practice now is in written agreements to have both parties write in what is known as a terminating clause, which continues it in effect subject to 30 days' notice.

“Senator DILL. I was speaking of contracts where there had been no arbitration, where contracts were going to expire, and the agreement was that they must give 30 days' notice, and my question went to this point, whether or not if there were no notice it was understood there would be no new contract, or whether the old contract would simply continue?

“Mr. ROBERTSON. On railroads where agreements are reached without entering into arbitration the same situation prevails. It is the practice today, to write in a certain terminating clause which continues the agreement in effect for a year, subject to 30 days' notice.

“Senator DILL. And if they do not give notice it goes right on?

"Mr. ROBERTSON. Yes, sir." 1924 *Senate Hearings*, pp. 20, 22-23.

Richberg concluded this portion of his testimony by stressing again the fundamental importance of the parties' agreements in the scheme envisaged by the draftsmen of the proposed legislation:

"I will say frankly that the act is drawn on the theory that nothing is accomplished in matters of this kind by attempting to swing a club, except the compulsion to live up to the agreement and to make agreements." 1924 *Senate Hearings*, p. 24.

Two years later, during hearings on the bill that became the 1926 Act, Richberg confirmed that the basic philosophy of the proposed legislation had not changed, leaving no doubt that the draftsmen of the 1926 Act intended that the parties' agreements should measure their rights. In the hearings before the House Committee on Commerce,¹⁷ Richberg testified:

"... All through the act is the theory that the agreement is the vital thing in life. I often quote, and I will do so here—I believe it is from Chesterton—a statement that 'Upon the slender thread of contract hangs all our civilization.' I think that is really a rather profound utterance. All the social relations of men, their ability to get along together, their ability to work out these enormous social undertakings that we have in the world of business and government, all rest upon the slender thread of contract. Contract is the foundation of all our successful relations between man

¹⁷ *Hearings on H.R. 7180 before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926)*, hereinafter referred to as 1926 *House Hearings*.

and man. And that we seek to preserve in here, knowing that the most futile way to improve humanity is to try to compel humanity to be better, and that persuasion and contract are the means to preserve harmony and to move forward." 1926 *House Hearings*, pp. 15-16.

Richberg also stated with respect to Section 2 First (to the effect that it is the duty of both carriers and their employees "to exert every reasonable effort to make and maintain agreements") that

"... there is the foundation of the entire legislation sought, and that is in agreement." 1926 *House Hearings*, p. 11.

That was not the testimony of a man who intended to write a law that would permit parties to an agreement to destroy each other's rights as they exist under the agreement by the simple unilateral act of proposing a change in the agreement.

The railroads' spokesman, Alfred P. Thom, agreed with Richberg's views. Reviewing "the leading principles of the bill," he stated:

"It provides in the first place that all disputes shall be adjusted by agreement, if possible. That the relationship of the parties shall be controlled by agreements." 1926 *House Hearings*, p. 113.¹⁸

¹⁸ In the 1926 Act, what has come to be called a "major dispute," see *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 723 (1945), was referred to, without use of the word "agreement," in Section 5 First (b) as a dispute "in respect to changes in rates of pay, rules, or working conditions," and in Section 6 as a dispute over "an intended change affecting rates of pay, rules, or working conditions." 44 Stat. 580, 582 (1926). Thus, in the 1926 Act the phrase "rates of pay, rules, or working conditions" was used to mean approximately the same thing as "agreement"; the phrase "in agreements" was not added to Section 6 until 1934. See pp. 39-40, *infra*. Similarly, during their explanation of the 1926 bill to the House and Senate Committees on Commerce, Richberg and Thom both tended to

If that history left any room for doubt as to the intent of the 1926 Congress, Congress settled the matter in 1934. Among the 1934 amendments, two are principally relevant here. One was the addition of Section 2 Seventh to the Act, providing that "[n]o carrier . . . shall change the rates of pay, rules, or working conditions of its employees, *as a class as embodied in agreements* except in the manner prescribed in such agreements or in Section 6. . . ." 48 Stat. 1188 (1934) (emphasis added). The second was the addition of the phrase "in agreements" to Section 6 so that it reads as it does now—that "[c]arriers and representatives of the employees shall give at least thirty days' written notice of an intended change *in agreements* affecting rates of pay, rules, or working conditions," and that "[i]n every case where such notice of intended change has been given, . . . rates of pay, rules, or working conditions shall not be altered by the carrier. . . ." 48 Stat. 1197 (1934) (emphasis added).

The railroads proposed the addition of the phrase "as a class as embodied in agreements" to the proposed Section 2 Seventh and the corresponding addition of the reference to "agreements" to Section 6. The railroads' principal spokesman testified before the Senate Commerce Committee¹⁹ that the railroads had proposed their amendments

use the phrase "rates of pay, rules, and working conditions" interchangeably with "agreement." For example, Thom explained the basic scheme of the Act before the Senate Committee in terms of the distinction between what are now known as "minor" and "major" disputes, stating that if a dispute "relates to changes in rates of pay, rules, or working conditions, to *new agreements with respect to these matters*, then, as I say, that must be considered in conference," etc. *Hearings on S. 2306 before the Senate Committee on Interstate Commerce*, 69th Cong., 1st Sess., p. 11 (emphasis added). Similarly, Richberg explained the provisions of the Act in the same way before the House Committee, characterizing a dispute over a change in "rates of pay, rules, or working conditions" as that term was used in the bill (1926 *House Hearings*, pp. 3, 5) as "a dispute over a change of agreement" (1926 *House Hearings*, p. 71) (emphasis added).

¹⁹ *Hearings on S. 3266 before the Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess. (1934), hereinafter referred to as 1934 *Senate Hearings*.

"because the working conditions are not defined in the act. *They are covered by agreement*, and we believe this is a helpful suggestion." 1934 *Senate Hearings*, p. 65 (emphasis added); see also p. 73. Commissioner Eastman, the principal proponent of the 1934 Railway Labor Act revision, agreed to the railroads' proposed amendments, stating that they were "an improvement and should be made." 1934 *Senate Hearings*, pp. 151, 155. In short, the purpose of the amendments was to make explicit what Congress had intended all along—that "rates of pay, rules, or working conditions" as used in Section 6 meant the parties' rights and duties under existing agreements. See *Williams v. Terminal Co.*, *supra*, 315 U.S., at 399-400.

In these circumstances, it seems abundantly clear that the Congress did not intend in Section 6 to create a vehicle by which unions or carriers, unilaterally, might destroy each other's rights as they exist under their contracts. On the contrary, the Congress meant to preserve those rights pending negotiations for change. Thus, the "working conditions" to which Shore Line employees were subject on January 27, 1966, when the BLF&E served its Section 6 notice, were what the adjustment board had said they were under the existing agreements—employees worked subject to the Shore Line's right to establish reporting points wherever the railroad deemed it desirable.

4. *The decision below will cause protracted delay in the modernization of railroad operations, will jeopardize rights of both carriers and employees, and will stultify collective bargaining.*

The decision below is hostile not only to the terms and legislative history of the Railway Labor Act, but also to its underlying policy of promoting tranquil relations between labor and management (see 45 U.S.C. § 151a), as well as to the National Transportation Policy—"to pro-

mote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation . . . all to the end of developing, coordinating and preserving a national transportation system . . . adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 54 Stat. 899 (1940).

As to the latter, the potential impact of the decision is clear—protracted delays in the institution of operational changes by railroads designed to improve the efficiency and safety of service to the public. "[T]he procedures of the [Railway Labor] Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks v. Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966). Under the decision below, unions can block operational changes for as long as it takes to exhaust those "long and drawn out" procedures, simply by serving a Section 6 notice proposing restrictions on the right to make changes.

That kind of protracted delay has been the result in the case at bar. The Shore Line sought to establish outlying assignments in order to provide improved service to shippers at reasonable cost. (See pp. 4, 6-7, *supra*.) The carrier refrained from instituting the change for *four years* during negotiations on the union's first Section 6 notice and during consideration of the dispute by the adjustment board. But then, when the adjustment board confirmed the carrier's right to establish such assignments and well after the union had withdrawn its first Section 6 notice, the carrier finally decided to exercise that right, only to be met with a second Section 6 notice and the claim, so far sustained, that the move must be foregone for yet another lengthy period.

Indeed, under the principles applied by the courts below, it is difficult to see how the Shore Line could ever assure

itself of the right to establish outlying assignments in its discretion, regardless of the benefits that might be accorded to the union and the employees it represents in exchange for that right. Suppose that in the negotiations upon the Section 6 notice served by the BLF&E the parties enter into an agreement which once again confirms the right of the Shore Line to establish such outlying terminals in exchange for various concessions by the Shore Line on other matters. What would prevent the union from serving a *third* Section 6 notice proposing once again to change the agreement so as to prohibit such actions, and then contending that the status quo provision prevents the Shore Line from establishing outlying assignments under its new agreement just as the instant notice was held to prevent the Shore Line from taking such action even though permitted by its present agreement?

Similar examples can be cited respecting other operational changes of broader significance to the shipping public. Thus, *Transportation-Communication Employees Union v. Illinois Central R. Co.* (Pet. App. 60a-63a) involved the installation by a railroad of expensive computerized equipment to control and record traffic movements. The Telegraphers served the carrier with a notice proposing an agreement regulating the use of the equipment, and then sought an injunction on the theory that the status quo provision of Section 6 precluded the railroad from discontinuing obsolete methods of communication and traffic control and using the new equipment while the union proposal was pending. The court that decided the instant case apparently would have granted such an injunction, thereby disabling the carrier from modernizing its operations even though it was free to do so under its contract with the union.²⁰ In an industry in need of sub-

²⁰ Numerous additional examples could be given. One that has come to our attention recently involves the "White House Agreement" of June 24, 1964, between the nation's carriers and the operating brotherhoods including

stantial modernization of equipment and operations,²¹ such a result is unacceptable unless required by overriding considerations of labor relations policy.

But the impact of the rule adopted by the lower courts upon labor relations would, if anything, be even more unsettling than its impact upon railroad operations. The predictable impact would be a sharp increase in the number of meritless union Section 6 notices. As matters stood prior to the *Shore Line* decision, the service of a notice as to which the union had no genuine expectation of securing agreement served no purpose, for once the procedures of the Act were exhausted the union would not regard the railroad's rejection of the demand as an appropriate occasion for a strike. Under *Shore Line*, however, a union, by serving a notice, may freeze a carrier in its efforts to institute operational changes that may be of critical importance to it, thus obliterating or suspending existing rights and achieving unilaterally what the union may never hope to secure by agreement. Such a wrong-headed result is offensive to common sense and is incompatible with the Act's purpose of rationalizing labor relations in the industry. It would be wholly inconsistent with the fundamental purpose of the relevant provisions of the Act, to "avoid any interruption to commerce or to the operation of any carrier engaged therein" by requiring carriers and unions alike "to

the BRT. Under the White House Agreement, the carriers obtained the right to discontinue the last yard engine at points where yard engines are no longer needed, in exchange for various pay adjustments and other concessions on the carriers' part. Subsequently, the BRT served the Texas and Louisiana Lines of the Southern Pacific with a notice proposing the abrogation of the relevant portions of the White House agreement. Under the principles applied below, was the carrier obliged not to discontinue yard engines under the provisions of the White House Agreement during the pendency of the proposal, and obliged nevertheless to continue paying employees in accordance with the pay provisions of the White House Agreement? The BRT contended that such was required by Section 6, and filed time claims based on that contention.

²¹ See Ex Parte No. 256, *Increased Freight Rates*, 329 I.C.C. 854, 873-874 (1967).

exert every reasonable effort to make and maintain *agreements*" (45 U.S.C. § 151a(1), 152 First) (emphasis added). As this Court has observed, the "processes of bargaining and mediation" called for by the Act would "become a sham" if a party "could unilaterally achieve what the Act requires be done by the other orderly procedures." *Railway Clerks v. Florida E. C. R. Co.*, *supra*, 384 U.S., at 247.

Moreover, the principles applied in the decision below would be destructive of employee as well as of employer rights. The union has contended at length that the status quo provisions of the Act apply to employers and unions alike—that Congress intended "the *status quo* . . . to be maintained by all parties . . ." (Br. Opp. 6). But under most if not all existing contracts, for example, the employees have a right to exercise seniority under designated circumstances so as to transfer to positions thought to be more desirable. Presumably, if the carrier served a Section 6 notice to abolish those seniority rights the status quo provision in Section 6 would prevent the exercise of those rights while negotiations were in progress, if the decision below is correct. Wage increases pursuant to "escalation" provisions in wage agreements likewise could be prevented merely by serving a Section 6 notice proposing to eliminate those provisions. These examples could be multiplied endlessly. The point is that the decision below is completely inconsistent with the philosophy of collective bargaining embodied in the Railway Labor Act. Neither a union nor a carrier should be permitted to deprive the other of rights under the existing contract merely by making a proposal to change that contract. If the contract is to be changed, that must be done by agreement or otherwise in accordance with the procedures specified in the Act. As union counsel testified in hearings with respect to issues involved in this Court's decision in *Telegraphers v. Chicago & N. W. R. Co.*, 362 U.S. 330 (1960), "as everyone knows, a proposal under

the Railway Labor Act is the *starting point, not the end, of collective bargaining.*" *Hearings on S. 3548 before the Special Subcommittee of the Senate Committee on the Judiciary*, 86th Cong., 2d Sess. (1960), p. 186 (emphasis added).

Conclusion

For the foregoing reasons, the decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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*Railway Labor Act Excerpts***APPENDIX A****Railway Labor Act**

(45 U.S.C. § 151, *et seq.*)
(Excerpts)

GENERAL PURPOSES

SECTION 2 (45 U.S.C. § 151a). The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (June 21, 1934, ch. 691, § 2, 48 Stat. 1186.)

GENERAL DUTIES

SECTION 2 First (45 U.S.C. § 152 First.) It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. (May 20, 1926, ch. 347, § 2 First, 44 Stat. 577; June 21, 1934, ch. 691, § 2, 48 Stat. 1187.)

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SECTION 2 Seventh (45 U.S.C. § 152 Seventh). No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act. (June 21, 1934, ch. 691, § 2, 48 Stat. 1188.)

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SECTION 3 (45 U.S.C. § 153). First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

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(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

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Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of

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the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon the award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board. (May 20, 1926, ch. 347, § 3, 44 Stat. 578; June 21, 1934, ch. 691, § 3, 48 Stat. 1189; June 20, 1966, P.L. 89-456, §§ 1, 2, 80 Stat. 208.)

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SECTION 5 (45 U.S.C. § 155). First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose. (May 20, 1926, ch. 347, § 5 First, 44 Stat. 580; June 21, 1934, ch. 691, § 5, 48 Stat. 1195.)

* * * *

SECTION 6 (45 U.S.C. § 156). Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes

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shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. (May 20, 1926, ch. 347, § 6, 44 Stat. 582; June 21, 1934, ch. 691, § 6, 48 Stat. 1197.)

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SECTION 10 (45 U.S.C. § 160). If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of

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the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose. (May 20, 1926, ch. 347, § 10, 44 Stat. 586; June 21, 1934, ch. 691, § 7, 48 Stat. 1197.)

National Mediation Board Instructions

APPENDIX B

**National Mediation Board
Instructions to Mediators**

May 12, 1960.

TO: ALL MEDIATORS

FROM: E. C. Thompson, Executive Secretary

Section 6 of the Railway Labor Act states:

“In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.”

The Board's policy in regard to the “status quo” provision quoted above is outlined in the following letters:

“August 17, 1956

“File No. C-2511

“Mr. T. C. Carroll, President
Brotherhood of Maintenance of Way Employees
12050 Woodward Avenue
Detroit 3, Michigan

Dear Mr. Carroll:

“Reference is made to your letter of August 10, 1956, in connection with our File C-2511 which covers your application for mediation dated July 27, 1956 in connection with a dispute between your organization and the Atchison,

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Topeka & Santa Fe Railway Company, Panhandle & Santa Fe Railway Co. and Gulf, Colorado & Santa Fe Railway Co. which you described on your application as follows:

“ ‘Failure of management to maintain status quo with respect to territorial limits and assignments currently in effect, and to dispose of our Formal Notice dated April 23, 1956, without undue delay.’ ”

“The Board considered your letter of August 10, 1956 in Executive Session on August 16, 1956. The Carrier has taken the position that the proposed rearrangement of sections and the consequent changes in forces are permissible under the present agreement, and if a dispute exists as to the application of the present rules it should be taken before the National Railroad Adjustment Board.

“The National Mediation Board does not understand Section 6 of the Railway Labor Act to mean that proposed revisions of agreement rules and the invocation of this Board's services on such proposed changes has the effect of staying the application of existing rules unless and until such existing rules are amended or revised.

“In view of the language of Section 2, Seventh of the Railway Labor Act stating ‘No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this act.’, the Board fails to find any basis for complying with your request.

“The Board does feel, however, that the carriers should not unduly delay completion of negotiations on the changes requested in your General Chairman's letter of April 23, 1956, and urges the carriers to arrange to meet your representatives and complete negotiations at the earliest practicable date.

National Mediation Board Instructions

"Copy of your letter of August 10, 1956 is being sent herewith to Messrs. Tucker, Buchanan and Olson of the carriers with copy of this letter.

"By direction of the NATIONAL MEDIATION BOARD.

"s/ E. C. THOMPSON
Executive Secretary"

"June 19, 1957

"A-5498

"Mr. C. R. Tucker, Vice President Operations
Atchison, Topeka and Santa Fe Railway
80 East Jackson Blvd.
Chicago 4, Illinois

"Mr. Geo. M. Harrison, Grand President
Brotherhood of Railway & Steamship Clerks
1055 Vine Street
Cincinnati 2, Ohio

Gentlemen:

"Reference is made to application for mediation filed by the Brotherhood of Railway & Steamship Clerks on June 5, 1957 in a dispute between that organization and the Atchison, Topeka and Santa Fe Railway Company described in the application as follows:

'Request of employees that the Carrier enter into an agreement with respect to its transfer of certain work and positions from Los Angeles, California, to Topeka, Kansas, and that such agreement be as set forth in letter dated May 6, 1957, attached hereto and designated "Exhibit A-1" as modified in letter dated May 17, 1957, attached hereto and designated "Exhibit A-2" both of which are made a part hereof.'

"As we understand it this application was intended to cover the proposals made by the General Chairman of the

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organization to Mr. W. G. Hunt, General Auditor of the Atchison, Topeka and Santa Fe Railway Company in his letter to Mr. Hunt of May 6, 1957, this letter being superseded by letter from the General Chairman to Mr. Hunt of May 17, 1957.

"The latter letter proposed the negotiation of an agreement between the parties providing certain benefits and protection for employees in the Accounting Department of the Santa Fe at Los Angeles who are proposed to be moved from Los Angeles to Topeka, Kansas. The carrier was advised of this application in our letter of June 7, 1957 and the carrier's reply of June 14, 1957 was received in this office on June 17, 1957. A copy of Mr. Tucker's letter of June 14 to this office is being sent to Mr. Harrison for his information. Mr. Harrison will note from Mr. Tucker's letter that the carrier's position is that the transfer of the employees from Los Angeles to Topeka will be made in accordance with the rules now contained in the current agreement between the parties.

"This application has been considered by the Board and on the basis of the proposal made to General Auditor Hunt in Mr. Byrne's letters of May 6 and May 17, 1957 the Board has directed that Mr. Harrison's application be docketed as Case No. A-5498.

"With reference to the question of maintenance of status quo as mentioned in Mr. Harrison's letter of June 5, 1957, it is not the Board's understanding of Section 6 that an invocation for its services has the effect of staying action under existing rules or renders compliance with existing rules a violation of the Railway Labor Act.

"A mediator will be assigned to commence the handling of this case in Chicago at an early date.

"Very truly yours,

"s/ E. C. THOMPSON
Executive Secretary"

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. 900

THE DETROIT AND TOLEDO SHORE LINE RAILROAD
COMPANY, *Petitioner*

v.

UNITED TRANSPORTATION UNION, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE
RAILWAY LABOR EXECUTIVES' ASSOCIATION
IN SUPPORT OF RESPONDENTS

INTEREST OF THIS AMICUS CURIAE

The Railway Labor Executives' Association is an unincorporated association with which are affiliated twenty standard labor organizations that are the duly authorized and designated collective bargaining representatives under the Railway Labor Act of almost all

the country's railroad employees and many of its airline employees. The labor organizations affiliated with the Association are:

American Railway Supervisors' Association
 American Train Dispatchers' Association
 Brotherhood of Maintenance of Way Employees
 Brotherhood of Railroad Signalmen
 Brotherhood Railway Carmen of the United States and Canada

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (into which on February 21, 1969 was merged Transportation - Communication Employees Union, formerly The Order of Railroad Telegraphers)

Transportation-Communication Division—Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees

Brotherhood of Sleeping Car Porters
 Hotel and Restaurant Employees & Bartenders' Int'l. Union

International Association of Machinists
 International Brotherhood of Boilermakers and Blacksmiths

International Brotherhood of Electrical Workers
 International Brotherhood of Firemen and Oilers
 International Organization Masters, Mates and Pilots of America

National Marine Engineers' Beneficial Association
 Railroad Yardmasters of America

Railway Employees' Department, AFL-CIO
 Seafarers' Int'l. Union of North America

Sheet Metal Workers' International Association
 United Transportation Union (a merger effective January 1, 1969 of the former Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen, and Switchmen's Union of North America)

This Court has repeatedly recognized Railway Labor Executives' Association as a proper party to appear and speak for its affiliated labor organizations and the railroad employees they represent in collective bargaining. *Interstate Commerce Commission v. Railway Labor Executives' Association*, 315 U.S. 373 (1942); *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950); *American Trucking Associations v. United States*, 355 U.S. 141 (1957).

This case turns upon the construction and application of several provisions of the Railway Labor Act (45 U.S.C. §§ 151 et seq.), especially Section 2, First; Section 2, Second; Section 2, Seventh; Section 5(b); Section 6; and Section 10. These are the fundamental provisions of the Railway Labor Act governing the procedural requirements for changing rates of pay, rules, and working conditions of railroad and airline employees. The resolution of the questions presented are thus of fundamental importance to the Railway Labor Executives' Association, its affiliated unions, and the employees they represent. The petitioner in this case is a single union. The petitioner must direct its attention to the specific detailed facts presented in this case, while the Association can concentrate on the importance of the decision below to all railroad labor and to the conduct of orderly collective bargaining.

QUESTIONS PRESENTED

The questions presented do not include the Question Presented in Petitioner's petition. Rather they are the Question Presented in Respondents' Opposition and a variant of that Question:

May a carrier unilaterally change a condition of employment that is a subject of mandatory bargaining,

without bargaining with the union, regardless of whether there is a provision on the subject in the collective bargaining agreement, regardless of whether there is a section 6 notice on the subject outstanding, and regardless of whether the subject is in mediation,—so long only as the condition of employment is a subject on which bargaining can be required?

STATEMENT OF THE CASE

We agree with the statement of the case as stated in Respondents' brief. We state here only a few brief facts on which the emphasis of this brief is dependent.

The collective bargaining agreement here involved does not deal with where the employees involved shall report for duty or be released from duty. (A. 143) But "for many, many years" the practice that governed the carrier's operation was for the employees involved to report for duty and be released from duty at Lang Yard in Toledo, Ohio. (A. 146, 148, 158, 167)

In 1961 the Carrier announced its intention to require certain crews to report for duty and to be released from their tour of duty at Edison Station in Trenton, Michigan instead of Toledo. There was some fuss about this, including mediation and a proffer of arbitration by the National Mediation Board. (A. 148, par. 5) The proffer of arbitration was rejected by both sides, the Carrier in its rejection stating that it had abandoned its plan to change the on-and-off-duty points for those crews to Trenton. (A. 149, par. 8)

Trenton is about 35 miles north of Toledo. (A. 159, 161) (The record at various points refers to the distance as more than 30 miles, 33 miles, 35 miles, and 30-40 miles; for the purpose of this case the differences are not material, and we take the figure as 35 miles.)

As noted, the collective agreement had no provision concerning where on-and-off-duty points would be, although the practice "for many, many years" had been that it would be Toledo. (A. 146) On January 27, 1966, the Brotherhood of Locomotive Firemen and Enginemen ("BLF&E"), one of the four operating unions that merged to form the Respondent United Transportation Union, served a notice under Section 6 of the Railway Labor Act that would add a provision that Lang Yard in Toledo would be, as was the long practice, the sole point for reporting on and off duty. Mediation by the National Mediation Board was invoked and was pending when this action was commenced on September 23, 1966. (A. 149, par. 9; 158) In the meantime the Carrier, on May 26 and September 19, 1966, after the BLF&E Section 6 notice, announced that certain crews would have their on-and-off-duty points changed from Toledo to Trenton. (A. 111, 120, 150 par. 10, 158)

This action was commenced by the Carrier to enjoin BLF&E from striking over those announcements. The Union counterclaimed to enjoin the Carrier from carrying out those announcements while the Section 6 notice and mediation were pending, in accordance with the *status quo* provisions of Sections 5 and 6 of the Railway Labor Act. The Carrier's request for an injunction against the Union was denied, and the Union's request for an injunction pending the disposition of the Section 6 notice and mediation was granted. (There was thus no strike because the Shore Line's threatened conduct that would have been the subject of the strike was enjoined.) The Courts below held that where a man reports for work and is released is a major condition of employment (A. 145); that changing the on-and-off point by 35 miles would be a change in

working conditions and established practices (A. 152, par. 8); and that unilaterally changing the on-and-off-duty point by 35 miles while a Section 6 notice on the subject was pending in mediation by the National Mediation Board would be a violation of the *status quo* provisions of Sections 5 and 6 of the Railway Labor Act. (A. 159)

Until it filed its Petition in this Court for a writ of certiorari, the Carrier took the position that BLF&E's Section 6 notice, establishing by agreement the on-and-off-duty point (instead of the theretofore undeviated practice) was not a subject of mandatory bargaining but was a matter of management prerogative. The District Court held that an on-and-off-duty point was a subject of mandatory bargaining because it was a "working condition" as that term is used in the Railway Labor Act (A. 161), and the Court of Appeals affirmed. (A. 168-69) In its Petition in this Court for the writ the Carrier does not state that issue as one of the Questions Presented nor does it make such argument in its brief, and we assume the Carrier is no longer making that contention.

SUMMARY OF ARGUMENT

1. The subject of on-and-off-duty point is a subject of mandatory bargaining. Here, for "many, many years" that point had been Lang Yard, Toledo. The Carrier's threat to move that point 35 miles to Trenton, without negotiation, if carried out, would have been in contravention of its bargaining duty under the Act even though there was no provision in the collective agreement on the subject, for no change may be made in "working conditions" without bargaining. This is the express holding of *Fibreboard Paper Products*

Corp. v. N.L.R.B., 379 U.S. 203 (1966), which is equally applicable to labor relations under the Railway Labor Act as under the National Labor Relations Act.

2. The Carrier's threat to move the on-and-off-duty point at a time when a Section 6 notice on that subject was outstanding and in mediation would have violated the *status quo* provisions of the Railway Labor Act applicable to "major" disputes. Such change may be made only after exhausting the Act's procedures applicable to such disputes although there was no provision in the collective bargaining agreement on the subject. The *status quo* provisions of Sections 5 and 6 of the Railway Labor Act apply regardless of whether the working condition is "embodied in an agreement". Only Section 2, Seventh, unlike Sections 5 and 6, prohibits a change in working conditions "embodied in agreements". Thus a violation of the *status quo* provisions of Sections 5, 6, or 10 is only a civil wrong and may be enjoined or some other appropriate remedy afforded, but if a carrier goes so far as to make a change in a working condition "embodied in an agreement" in violation of Section 2, Seventh, then Section 2, Tenth makes it a criminal wrong punishable by fine or imprisonment or both and each day of such offense is a separate offense.

ARGUMENT

1. A CARRIER MAY NOT MAKE A UNILATERAL CHANGE IN RATES OF PAY, RULES, OR WORKING CONDITIONS WITHOUT FIRST HAVING EXHAUSTED THE APPLICABLE PROCEDURES OF THE RAILWAY LABOR ACT WHETHER OR NOT THERE IS IN EXISTENCE AN AGREEMENT RELATING TO THE SUBJECT MATTER OF THE CHANGE.

The District Court sustained BLF&E's counterclaim and enjoined the Carrier from establishing a new on-and-off-duty point at Trenton or any other point not previously established until the pending major dispute

in National Mediation Board Case No. A-7839 should be handled to a conclusion and the right to resort to self-help matured by completing the procedures of Sections 5 and 6 of the Railway Labor Act or earlier if agreement on the dispute should be reached. (A. 153-54)

The Carrier asserts that a Special Board of Adjustment decided that the Carrier had the right claimed. All that Board decided (with respect to another assignment) was that there was no provision in the *agreement* precluding the establishment of an outlying assignment. (A. 110) It did not determine the Carrier's rights or obligations under the Railway Labor Act in this regard; such question was not raised and probably would have been beyond its jurisdiction.

The Shore Line contends that in the absence of a written agreement on the subject, a carrier subject to the Railway Labor Act is at liberty, as a matter of management prerogative, to make unilateral changes in the rates of pay, rules, and working conditions of its employees unfettered by any provision of that Act dealing with procedures to be utilized when one of the parties desires to change rates of pay, rules, or working conditions. In other words, it contends that any condition of employment not previously included in an agreement is a matter of management prerogative and may be changed unilaterally by the Carrier, without bargaining, regardless of how long the condition of employment had been in effect.

Initially, it is no longer disputed, nor can it reasonably be disputed, that the on-and-off duty point is a "working condition" as that term is used in the Railway Labor Act, and that a 35 mile change in that point is a change in a "working condition". The

undisputed facts show that, with respect to the on-and-off-duty point of the crews here involved, that point had been in Toledo for many, many years.

One of the issues raised by the Brotherhood's Counterclaim, therefor, is whether the Carrier had the unilateral right, as a matter of management prerogative, to change a condition of employment long in existence, without bargaining. We submit that the Carrier did not have that right regardless of whether the factual situation in existence at the time the unilateral change in the working condition is contemplated is the result of an agreement or simply a practice that undeniably has been in existence for many, many years with respect to the crews here involved. The Carrier contends that management prerogative, even where a condition of employment is concerned, is curtailed only by agreement. In so contending, however, the Shore Line disregards fundamental principles established by the Railway Labor Act, a decision of this Court, and decisions of several Courts of Appeals.

The Railway Labor Act does not encourage unilateral action. On the contrary its purposes, as stated in Section 2 (45 USC, § 151a) are: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein (4) to provide for the prompt and orderly settlement of *all* disputes concerning rates of pay, rules, or working conditions; . . ." (Emphasis added)

Indeed, the first duties placed upon all parties to the Railway Labor Act are to:

"exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such

agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." (45 U.S.C., § 152, First).

"All disputes . . . shall be considered, and, if possible, decided, with all expedition, in conference . . ." (45 U.S.C., § 152, Second). (Emphasis added)

If the duty imposed by Sections 2, First and 2, Second upon both parties to make every reasonable effort to make agreements concerning working conditions is to be given effect then unilateral changes by the carrier in the conditions as they exist in fact must be prohibited until the procedures of the Railway Labor Act, designed for effecting the settlement of disputes by agreements rather than by force, are exhausted.

This Court has recognized the deleterious effect upon labor relations of an employer making unilateral changes in working conditions of employees without bargaining even in the absence of prior agreement concerning the subject matter, and has held such action to be unlawful as a violation of the duty to bargain concerning working conditions.

In *Fibreboard Paper Products Corp v. N.L.R.B.*, 379 U.S. 203 (1964), this Court held that it was a violation of the bargaining obligations of the National Labor Relations Act (29 U.S.C., §§ 151-168) for an employer to make a change in "conditions of employment" without first bargaining about the change even though the condition being changed was not included in the collective bargaining agreement. In that case the employer "contracted out" to an independent contractor its maintenance work. The Court held that

"contracting out" was a subject of mandatory bargaining and that the N.L.R.B. therefore properly found that the employer had unlawfully refused to bargain and properly ordered reinstatement and back pay even though the collective agreement had no provision concerning "contracting out".

Thus, a change in one of the "working conditions" concerning which an employer may be required to bargain may not be made without first bargaining about it even though the condition has not theretofore been the subject of bargaining or agreement and, until there has been bargaining, the *status* of the condition as it existed in fact at the time of the contemplated unilateral change must be maintained.

Several Courts of Appeals have held to the same effect,—that a practice which is a condition of employment and so a subject of mandatory bargaining may not be changed without bargaining even though it has not been bargained previously and is not in an agreement.

In *N.L.R.B. v. Central Illinois Public Service Co.*, 324 F. 2d 916 (7th Cir. 1963), the employer gave its employees a discount on the gas they used, without any agreement for such discount, and then discontinued doing so without negotiating about it. The Court of Appeals for the Seventh Circuit affirmed the decision of the N.L.R.B. that such unilateral change was a violation of the duty to bargain and affirmed the Board's order directing the employer to reimburse employees for a period during which the discount had been discontinued. The Court stated (324 F. 2d at 918):

"In this case, the employees had selected a union as their collective bargaining representative . . . Respondent unilaterally discontinued its gas dis-

count to a specified class of employees without affording the bargaining representative an opportunity to discuss and negotiate concerning the change . . . A finding of bad faith is not a prerequisite in such a situation."

Decision of Courts in other circuits are to the same effect. *General Telephone Co. v. N. L. R. B.*, 337 F. 2d 452 (5th Cir. 1964) (an employer which had paid a Christmas bonus for 35 years without discussing it with the union was held to have violated its bargaining duty when it unilaterally discontinued the bonus); *N. L. R. B. v. Lehigh Portland Cement Co.*, 205 F. 2d 832 (4th Cir. 1953) (an employer which rented property to employees was required to negotiate with the union a change in the amount of the rentals even though the subject had never been discussed during all the period of the union's representation); *N. L. R. B. v. Niles-Bement-Pond*, 199 F. 2d 713 (2d Cir. 1952) (employer's unilateral discontinuance of Christmas bonus held to be unlawful refusal to bargain notwithstanding absence of prior agreement on the subject). We know of no court that has held to the contrary.

The Court of Appeals for the Fifth Circuit recently decided a case under the Railway Labor Act very much like this Court's decision in *Fibreboard*. *Seafarers Union v. Galveston Wharves*, 351 F. 2d 183 (1965), 368 F. 2d 412 (1966), 400 F. 2d 320 (1968), cert. den. May 19, 1969 (37 U.S. Law Week 3440). In that case a "carrier" subject to the Railway Labor Act operated a grain elevator and was subject to that Act for all its employees.* The collective bargaining agreement had

* A grain elevator is subject to the Railway Labor Act if it is operated by a railroad or by a company owned or controlled by a railroad and performing a service in connection with railroad transportation. 45 U.S.C. § 151, First.

no provision concerning contracting out or leasing a facility to a non-carrier. The carrier leased the elevator to a non-carrier but the lease had not yet become effective. The union served a Section 6 notice to include in the contract provisions concerning leasing or subcontracting. The carrier responded by stating that there was nothing to negotiate on that subject concerning the grain elevator because it had leased it and was no longer operating it. The Court of Appeals three times ruled that whether an employee would be working or not working (as in *Fibreboard*) was a working condition and that the carrier could not lawfully lease the facility, thus depriving the men of employment, without first bargaining with the union, that the carrier was required to bargain with the union concerning the leasing of the elevator even though the lease had gone into effect, and that since the carrier had effected the lease unlawfully without first bargaining with the union an appropriate remedy would be to require the carrier to pay the unemployed men the wages the men would have earned until the Section 6 notice should be disposed of. The Court said (351 F. 2d at 188-89):

"... a carrier in imposing changes in nowise contemplated or arguably covered by the agreement is not to escape the impact of the Act merely through the device of unilateral action. . . ."

The Court said further (351 F. 2d at 190):

"The § 6 notice was appropriate and was in no sense a verbal formalism concocted to give the appearance of a legal right not available. (see note 25, supra) Whether the union would be able to obtain any relief, whether its economic power *vis-a-vis* the Carrier would or would not result in any advantage, the Union through the § 6 notice had the clear right to demand that the Carrier

comply with the emphatic demand of § 2 First and Second (see note 14, *supra*). As the announced action most assuredly was a change in "working conditions", the fact that the Union's § 6 notice came after the event is of no moment."

On the second appeal in that case, concerning the appropriate remedy, the Court said (368 F. 2d 413):

"While we did not foreclose the possibility that the lease might have to be unscrambled—a literal restoration of the status quo—we felt that something less could be substituted, so long as the employees were substantially in the same position as if Galveston Wharves had complied with the Act."

The import of the above-cited provisions of the Railway Labor Act, the *Fibreboard* case, and the Circuit Court cases to the issue here is clear. If it be established that a particular condition of employment has been in effect for a reasonable length of time, an employer may not unilaterally change it without first bargaining, notwithstanding the fact that the existing situation was not the result of agreement between the parties. The existence of the factual situation coupled with the fact that the matter involved constitutes a subject of mandatory bargaining are sufficient to require the employer to bargain prior to effectuating any change.

The Shore Line cites *Manning v. American Airlines*, 329 F. 2d 32 (2d Cir. 1964) *c. d.*, 379 U.S. 817 and *Bhd. of R. Trainmen v. Akron & Barberton Belt R. Co.*, 385 F. 2d 581 (D.C. Cir. 1967) *c. d.*, 390 U.S. 923, but it misses the significance of those cases to the situation here presented. Both those cases hold that under the Railway Labor Act a working condition in effect on any day remains in effect, regardless of what the

collective agreement says about it, until changed in accordance with the procedures of the Act. In the *Manning* case the Court referred to

"... the then unique provisions of the Railway Labor Act for maintaining the *status quo* while the parties to a labor dispute pursue various stages of negotiation, mediation or arbitration"
329 F. 2d at 34.

And in *Akron & Barberton Belt* the Court said (385 F. 2d at 593):

"The predicate of our ruling is, simply, the force of the Railway Labor Act. Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act."

It would be virtually impossible to include all "working conditions" in a collective bargaining agreement. Where a particular condition is satisfactory or tolerable to both sides, it is often omitted from the agreement. Suppose, for example, a collective agreement covering many subjects,—hours of work, vacations, holidays, sick leave, hospital insurance, and many other subjects,—but not rates of pay. Hardly anyone would argue that in such situation a carrier would have the right to reduce rates of pay unilaterally or that such action without bargaining would not be a violation of the duty to bargain under the Railway Labor Act concerning "rates of pay, rules, and working conditions". The situation is no different with respect to the working condition of the on-and-off-duty point.

Here, since the undisputed facts show that the on-and-off-duty point for many, many years was in Toledo and not 35 miles away, and since it is no longer challenged that such situation is a subject of mandatory bargaining under the Railway Labor Act, it follows that the Shore Line could not lawfully unilaterally change that *status* without following the bargaining provisions of the Railway Labor Act.

II. A CARRIER MAY NOT MAKE A UNILATERAL CHANGE IN RATES OF PAY, RULES, OR WORKING CONDITIONS DURING THE PENDENCY OF A SECTION 6 NOTICE COVERING THE SUBJECT OF THE CHANGE BECAUSE OF THE STATUS QUO PROVISIONS OF THE RAILWAY LABOR ACT.

In our earlier argument we showed that in the face of the long-established practice, constituting a condition of employment, the Carrier did not have the prerogative to change, unilaterally, by 35 miles, the on-and-off-duty point without first utilizing the procedures of the Railway Labor Act even in the absence of an agreement limiting such right, and that it follows that the *status quo* must be maintained in the interim whether or not a Section 6 notice is outstanding. We now show that where a Section 6 notice on a working condition is outstanding, a unilateral change in such condition is doubly unlawful because of the *status quo* provisions of the Railway Labor Act.

The District Court was correct in requiring the Shore Line to maintain the *status quo* that was in effect on January 27, 1966. On that date, the Brotherhood served a notice pursuant to Section 6 of the Railway Labor Act to include in the collective bargaining agreement the long practice of Toledo being the on-and-off-duty point. At the present time, the dispute engendered by that notice is in mediation before the National Mediation Board.

Under the *status quo* provisions of the Railway Labor Act, when a dispute has become the subject of a Section 6 notice, neither side may take any unilateral action with regard to the subject of the notice until the procedures of the Railway Labor Act have been invoked and exhausted regardless of whether the subject is already included in an agreement.

The Railway Labor Act contains four *status quo* provisions with respect to disputes which arise when one of the parties seeks to make a change in rates of pay, rules, or working conditions. It should be noted at the outset that the "collective bargaining agreement," as it is known in the railroad industry, consists of a series of separate agreements, made at different times, relating to various subjects, and that a "change" in it is accomplished no less by adding an agreement relating to a theretofore omitted subject than by modifying or cancelling one of the existing agreements (A. 86).

The first *status quo* provision is found in Section 2, Seventh of the Act (45 U.S.C., § 152, Seventh). It provides:

"No carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 6 [156] of this title."

A violation of this provision—changing a working condition embodied in an agreement without following the procedures of Section 6,—is a crime punishable by imprisonment or fine or both. Section 2, Tenth (45 U.S.C., § 152, Tenth).

Section 2, Seventh, however, does not deal with the procedure for accomplishing changes in rates of pay,

rules, or working conditions nor with the rights and obligations of the parties during the process of accomplishing a change. It merely makes criminally unlawful a change by a carrier in working conditions which are embodied in agreements without complying with the provisions of Section 6.

It is clear from the *status quo* provisions of Section 6, hereinafter quoted, and from other sections of the Railway Labor Act, that the *status quo* which is required to be maintained after the Section 6 notice is served is not limited to the *status quo* as expressed in a written agreement.

The *status quo* which the Railway Labor Act requires to be maintained while a dispute arising from a Section 6 notice is going through the processes of conference, mediation, and possible consideration by a Presidential Emergency Board or an arbitration board are those rates of pay, rules, and working conditions which exist in fact at the time the Section 6 notice is served.

The *status quo* provision of Section 6 of the Railway Labor Act, which is applicable from the time the notice is served and while conferences are being held with reference thereto and after the services of the Mediation Board have been requested by either party or after the Mediation Board has proffered its services, is that:

“ . . . rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this title, by the Mediation Board.”

The *status quo* provision of Section 5 First (b) of the Railway Labor Act (45 U.S.C., § 155, First (b)),

like the *status quo* provision of Section 6, is expressed in the disjunctive. It provides:

"... no change shall be made in the rates of pay, rules, or working conditions *or established practices* in effect prior to the time the dispute arose" (Emphasis supplied).

This provision, like Section 6, is not limited to changes in rates of pay, rules, or working conditions in effect as the result of an agreement. It specifically extends the *status quo* requirement to "established practices" regardless of how the practice came about.

The *status quo* provision of Section 10 of the Railway Labor Act (45 U.S.C., § 160) (consideration of a dispute by a Presidential Emergency Board) is that:

"... no change, except by agreement, shall be made by the parties to the controversy *in the conditions out of which the dispute arose.*" (Emphasis supplied.)

The *status quo* required by Section 10 is the "conditions out of which the dispute arose"—not to only those "conditions" which are the result of agreement.

Sections 5, 6, and 10 of the Act are concerned with the same "dispute" or "controversy", i.e., the "dispute" or "controversy" which arises from an intended change in rates of pay, rules, or working conditions, and there can be no question that while the procedures of Section 6 for conference and of Section 5 for mediation are being pursued there may not be a lawful resort to self-help by either of the parties to such a dispute.

To exclude "established practices" or "the conditions out of which the dispute arose" from the *status quo* provisions of the Act, or to limit the applicability of the *status quo* provisions only to those "rates of

pay, rules, or working conditions" which are in effect as the result of agreement, would be to ignore the *status quo* provisions of Sections 5, 6, and 10 and to deny them their obvious meaning and intended effect. It would also *pro tanto* repeal the obligations imposed by Section 2 First and Second to make every reasonable effort to settle all disputes by negotiation and to make and maintain agreements.

Recognizing that to permit a union to resort to self-help and use its economic strength in the form of a strike to enforce the settlement of disputes which are pending before the National Railroad Adjustment Board would frustrate the jurisdiction of the National Railroad Adjustment Board, this Court held in *Bhd. of Railroad Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30 (1957), that an anti-strike injunction in such cases is not precluded by the Norris-LaGuardia Act because such a strike would defeat the jurisdiction of the Adjustment Board over such minor disputes.

Similarly, if one party to a "major" dispute which arises under Section 6 of the Railway Labor Act could resort to self-help and take unilateral action with respect to the dispute while it is the subject of conferences required by Section 6 or while it is pending within the jurisdiction of the National Mediation Board as provided by Sections 5 and 6, such action would frustrate the purposes of the Railway Labor Act and of the conferences and mediation required by it. If the jurisdiction and mediatory function of the National Mediation Board are to be preserved and made effective, unilateral changes by the carrier in the conditions as they exist in fact must be prohibited until the procedures of the Railway Labor Act, designed for effecting the settlement of disputes by agreements rather than by the use of economic force, are exhausted.

The District Court in this case rejected the Carrier's approach. It stated (A. 162):

"The general scheme of the statute indicates that the purpose of the status quo provision is to aid the National Mediation Board in its function of helping the parties to reach an agreement. If the carrier can unilaterally change the working conditions of its employees while such conditions are the subject of mediation efforts by the Board, the work of the Board would be greatly hampered. Thus, it would appear that whenever the services of the Board have been invoked, its jurisdiction should be protected by the application of the provisions of section 6 even if the particular condition is not fixed by the existing agreement. There is no reason why the status quo provisions should not apply whenever the Board is mediating a dispute."

See also *Spokane, Portland and Seattle R. v. Order of Railway Conductors and Brakemen*, 265 F. Supp. 892, 893-94 (D.D.C. 1967).

Another case in point is *Chicago and Western Indiana R.R. et al. v. Bhd. of Ry. Clerks et al.*, 231 F. Supp. 561 (N.D. Ill., 1963) *unappealed*. In that case two carriers maintaining joint offices decided to have separate facilities. They transferred employees from the joint offices to their newly formed separate offices without bargaining with the union. The collective bargaining agreements of the carriers and the union had no provision to cover the situation. Each of the parties had served Section 6 notices covering the matter, however, and the disputes were pending in mediation at the time the unilateral transfers were made. Judge Perry of the District Court entered a mandatory injunction requiring the carrier to restore the *status quo* on the ground that the Section 6 notices had given rise to a "major" dispute and no changes in the *status quo*

could be made until the procedures of the Act had been exhausted.

The Carrier argues that the *status quo* provisions of Sections 5 and 6 are limited to those working conditions referred to in Section 2, Seventh, i.e., those embodied in agreements. If that is so, then Section 2, Seventh would be entirely superfluous and it would have been pointless for Congress to have added it to the Act in 1934. As we have seen above, Section 2, Seventh does serve the purpose of making a unilateral change in a working condition embodied in an agreement a crime while a violation of the *status quo* provisions of Sections 5, First, (b), Section 6, and Section 10 are only civil wrongs.

The Carrier argues also that the *status quo* provision of Section 5 had no application to the present situation because its provision applies for a specified period *after* mediation is concluded and the present dispute is still in mediation.

Such argument highlights the fallacy of the Carrier's attempt to have this Court read Section 6 other than literally. Under such argument it would be unlawful for a carrier to make a unilateral change in a working condition for a time after mediation is concluded but not while mediation by the National Mediation Board is pending. Such foolishness should not lightly be attributed to Congress and surely should not be attributed when to do so requires a distortion of the plain meaning of the literal words of the statute. Plainly, Section 6 prohibits a unilateral change while direct negotiations on a Section 6 notice are going on and while the Mediation Board has jurisdiction, while Section 5, First, (b) maintains the *status quo* for thirty days thereafter both to provide a cooling off period and to give the

President an opportunity to decide whether to invoke Section 10 (the Presidential Emergency Board provision).

Thus, giving the *status quo* provisions of Sections 5 and 6 their plain, natural meaning makes a harmonious integrated whole of Section 2, Seventh, Section 5, Section 6, and Section 10, each serving its own purpose, while reading them as the Carrier would have us do, departing from their plain literal meaning, results in a hopeless hodgepodge.

Since the Shore Line's threatened conduct would constitute a violation of both express commands and requirements of the Railway Labor Act, it was properly enjoined. *Virginian Ry. v. System Federation*, 300 U.S. 515 (1937); *Brotherhood of Railroad Trainmen v. Chicago River and I. R. Co.*, 353 U.S. 30 (1957).

CONCLUSION

The Courts below reached their conclusion on the basis of Section 5 and Section 6 of the Railway Labor Act. They could also have reached that conclusion on the basis of Section 2, First, Section 2, Second, and the *Fibreboard* doctrine. The decision below should be affirmed.

Respectfully submitted,

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June, 1969

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IN THE
SUPREME COURT OF THE UNITED STATES

JOHN T. DAVIS, CLERK

October Term, 1969

No. 29

THE DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY, *Petitioner*,

v.

UNITED TRANSPORTATION UNION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 29

THE DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY, *Petitioner,*

v.

UNITED TRANSPORTATION UNION, *et al.,*
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS

This brief is filed by the United Transportation Union, successor organization to the Brotherhood of Locomotive Firemen and Enginemen which was an original defendant, along with two of its officers for whom the brief is also filed. United Transportation Union was substituted for the Brotherhood of Locomotive Firemen and Enginemen as a party respondent by the Court's order of March 3, 1969. (A. 172.)

QUESTION PRESENTED

May a carrier be enjoined from unilaterally changing the working conditions of its employees prior to exhaustion of the Railway Labor Act's machinery for the handling of major disputes, when the union has served a Section 6 notice for a contract modification which would prohibit the change in question, and the matter is pending before the National Mediation Board following its acceptance of jurisdiction over the dispute?

STATEMENT OF THE CASE

Petitioner's statement of the facts involved is substantially correct and complete except for the few inaccuracies and omissions noted below, and will not be reiterated here.

As noted by petitioner (Br., p. 5), mediation of the Section 6 notice (A. 104, 105) served by the Brotherhood of Locomotive Firemen and Enginemen (BLF&E) in 1961, seeking protective conditions for employees who would be affected by the establishment of new assignments at Trenton, Michigan, was unsuccessful. Following refusal of the parties to submit their dispute to arbitration, the National Mediation Board, on March 4, 1963, terminated its services, at the same time calling the attention of the parties to the requirement of Section 5, First (b) of the Railway Labor Act (45 U.S.C., Sec. 155) that the *status quo* be maintained for another 30 days (A. 138, 139). Thereafter, on April 3, 1963, the Board closed its file, leaving the parties free to resort to self-help (A. 109).

In its letter of February 8, 1963, declining the Board's proffer of arbitration, the Detroit and Toledo Shore Line Railroad (Shore Line) had stated that it was "no longer

contemplating a change in setting up a tie-up point that was used as the basis of the organizations' Section 6 Notice", and that the problem was therefore moot (A. 137).

However, on September 24, 1963, the Shore Line, by bulletin posted on that date, created new assignments requiring the employees to report for work at Dearoad, Michigan, near Detroit, Michigan, eleven miles north of Trenton (A. 7, 110). Shore Line took the position that this was not within the scope of BLF&E's Section 6 notice of April 28, 1961, which had been precipitated by the proposal to establish assignments operating out of Trenton (A. 33). The new assignments created at Dearoad were the first ones which had ever originated at a point other than Lang Yard in Toledo, Ohio (A. 148, 158, 166).

Then, after the BLF&E had unsuccessfully challenged the Dearoad assignments before a Special Board of Adjustment as a violation of the written collective bargaining agreement, Shore Line "revived its plan to establish such assignments at Trenton" (Pet. Br., p. 6). This precipitated the BLF&E's Section 6 notice which is directly involved here, that of January 27, 1966. Shore Line's attempt to put the new assignments at Trenton into effect without completion of the handling of this notice under the machinery of the Railway Labor Act gave rise to this litigation.

Shore Line took the position in the District Court that BLF&E's proper remedy was to submit its dispute to the National Railroad Adjustment Board, and that a minor dispute was involved (A. 7-8). The District Court rejected this contention (A. 150) and it was not urged by Shore Line on appeal. In addition Shore Line unsuccessfully urged in both courts below that the provisions of the Railway Labor Act did not apply because the dispute growing

out of the BLF&E's Section 6 notice of January 27, 1966, concerned a "non-bargainable" matter within the realm of "managerial discretion" (A. 145, 161, 168-169). Neither of these arguments has been urged in the petition for certiorari or Shore Line's brief on the merits, and we understand that under Rule 23 (1) (c) of this Court they may not be further pressed.

SUMMARY OF ARGUMENT

1. The provisions of the Railway Labor Act for the handling of major disputes evidence the heavy reliance placed by Congress upon mediation and the implementation of the Act's voluntary procedures by "cooling off" periods during which the *status quo* was to be maintained by all parties, to avoid strikes and interruptions to commerce. By the plain wording of the statute, the prohibitions against changes in the *status quo* become operative when either party serves notice under Section 6 of proposed contract changes. Under the express language of the Act the changes specifically prohibited, after a Section 6 notice has been served, are those in "rates of pay, rules or working conditions" (Section 6); "rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose" (Section 5 First (b)); and "the conditions out of which the dispute arose" (Section 10).

Nowhere in the Act is there any indication that the foregoing *status quo* requirements are to be so narrowly construed as to include only those changes already restricted by existing agreements. Section 2 Seventh, relied on by the Shore Line, does not purport to define the *status quo* which must be observed during the handling of a major dispute. It appears in the section of the Act creating the duty to bargain collectively and to "make and maintain

agreements." (Section 2 First), and simply provides that if a carrier wishes to change rates of pay, rules or working conditions which it has already agreed to, it may do so only in the manner provided in the existing agreement or by resort to the Section 6 notice procedure.

2. The legislative history of the statute compels the conclusion that Congress intended and understood that the duty to maintain the *status quo* was not limited to the mere observance of existing contractual obligations. Testimony of witnesses for the proposed legislation clearly indicated that the prohibition of changes in the *status quo* during the processing of major disputes was to have a broad rather than a narrow interpretation. The Railway Labor Act of 1926, which first adopted the provisions here involved, was sponsored by management and labor jointly, and represented compromises on both sides. It was understood that the maintenance of the *status quo* during the cooling off periods, for the protection of the public, was a price that both were willing to pay for the right to bargain collectively on a voluntary basis, without being subjected to compulsory arbitration in the negotiation of their labor agreements.

3. Decisions of this Court and other federal courts have recognized both the existence of the requirement to maintain the *status quo* during the handling of major disputes, and its applicability to railroads as well as their employees. Enforcement of this duty by injunctive process has been recognized as proper. The scope of the *status quo* which must be preserved has not been limited to provisions of existing agreements, especially with respect to those matters which are being bargained about and mediated pursuant to a Section 6 notice. There is no substantial body of pertinent authority to the contrary.

4. The decision below gives effect to the Railway Labor Act's primary purpose of avoiding interruptions to commerce in the railroad industry. It does not operate to destroy existing rights, but recognizes that management and labor alike are subject to certain mandatory requirements for the orderly settlement of their disputes before they may act unilaterally, upon the expiration of the statutory "cooling off" periods. A contrary result, permitting a carrier to put into effect changes in working conditions which the union is seeking to prohibit or restrict, while at the same time requiring the union to stay its hand for the statutory period, would make collective bargaining a sham and reduce to a mere formality the major disputes machinery of the Act.

5. The decision below may be sustained as a proper exercise of injunctive power to enforce the duty of good faith bargaining under the Railway Labor Act, and of equitable discretion to protect the jurisdiction of a statutory administrative tribunal.

ARGUMENT

In the railroad industry, labor-management relations have long been conducted pursuant to a statutory system of voluntary collective bargaining. In enacting the Railway Labor Act (45 U.S.C., Sec. 151 et seq.), Congress placed heavy reliance on negotiation and conference, conciliation, and voluntary arbitration (*General Committee, B.L.E. v. Missouri-K.-T. R. Co.*, 320 U.S. 323 (1943)).^{1/} The only deci-

^{1/} See also *Pennsylvania R. Co. v. United States Railroad Labor Bd.*, 261 U.S. 72, 79-80 (1923), *Pennsylvania R. System v. Pennsylvania R. Co.*, 267 U.S. 203 (1925), *Texas & N.O. R. Co. v. Brotherhood Ry. & S.S. Clerks*, 281 U.S. 548 (1930), and *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937).

sional process entering into the resolution of major disputes over the making or changing of labor agreements was the finding of facts by an Emergency Board under Section 10 of the Act (45 U.S.C., Sec. 160), but such findings were enforceable only insofar as they might bring public opinion to bear upon the disputants. (See *Pennsylvania R. Co. v. United States Railroad Labor Bd.*, 261 U.S. 72, 79-80 (1923).)

In order to protect the public from interruptions to commerce, however, Congress placed upon the parties to these disputes the duty to maintain the *status quo* during "cooling off" periods while pursuing these voluntary processes. (*Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks*, 281 U.S. 548, 565-566.) But although the statute imposes this restraint upon both labor and management, petitioner Shore Line here urges that while its employees represented by BLF&E were bound to refrain from any resort to self-help while pursuing the major disputes machinery to a conclusion, the Shore Line had the right to make desired changes in their working conditions, by unilateral action with respect to the very subject matter of the dispute, unhampered by any waiting periods or obligation to maintain the *status quo* existing when the dispute arose.

Shore Line bases this conclusion on the argument that insofar as carriers are concerned, the Act's *status quo* requirements only encompass those rates of pay, rules, or working conditions which are already embodied in an existing agreement. In other words, it contends that the only *status quo* which the statute requires it to maintain is that to which it has already bound itself contractually.

What is contended by the Shore Line in this case would make a mockery of the *status quo* requirements of the Act which were imposed upon both parties to railroad labor disputes, for the protection of the public, as conditions of the voluntary collective bargaining permitted by the statute. And it would make a sham of the bargaining process itself, permitting carriers to achieve their objectives unilaterally and immediately, while requiring employees to pursue mechanically the major disputes procedures of the Act before being in a position effectively to oppose or restrict changes in working conditions which were already an accomplished fact.

1. **The decision below is in accord with the provisions of the Railway Labor Act setting forth the procedures to be followed and the conditions which must be observed in the handling of major disputes over the making or changing of collective bargaining agreements.**

The decision below applied the Railway Labor Act's *status quo* requirements in accordance with the clear and unambiguous language in which they are set forth. These requirements appear in Section 5, dealing with the mediation and conciliation functions and duties of the National Mediation Board; in Section 6, stating the procedure to be followed, including reference to the Mediation Board for handling under Section 5, in the processing of major disputes; and in Section 10, providing for the creation of Presidential Emergency Boards when mediation of important disputes has failed.

In none of these sections is the *status quo* which must be preserved defined as consisting simply of the current obligations of existing contracts. On the contrary, the language employed compels the conclusion that no such narrow restriction was contemplated. Thus in Section 5 First (b) it is specified that when mediation has failed and arbitration has been declined, "for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, *no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.*"

(45 U.S.C., Sec. 155 First (b).) Section 6 provides that when notice of an intended change in agreements has been given, and during conferences or mediation, "*rates of pay, rules or working conditions shall not be altered by the carrier*" until proceedings under Section 5 have been completed, or conferences between the parties have been terminated for ten days without recourse to the Mediation Board. (45 U.S.C. Sec. 156.) And Section 10 states that in the event a dispute reaches the stage of handling before a Presidential Emergency Board, "After the creation of such board and for thirty days after such board has made its report to the President, *no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose.*" (45 U.S.C., Sec. 160) (Emphasis supplied throughout.)

The wording of the quoted portions of the statute, in which Congress expressed the *status quo* requirements by which is sought to prevent interruptions to commerce during the pendency of major disputes, clearly refutes the Shore Line's contention that the *status quo* consists only of

existing contract rights. Had such been the intent, it would have been expressed in simpler, more appropriate language.

The provisions of the statute quoted above are the only ones which describe or set forth the *status quo* which the parties must preserve during the processing of a major dispute.

The statutory language which the Shore Line contends (Br., pp. 29-31) must be read into these provisions, to limit their scope to working conditions "embodied in agreements", e.i.: that contained in Section 2 Seventh, and in the introductory sentence of Section 6, does not purport to set forth any *status quo* duties attendant upon major disputes procedures. It simply states when those procedures must be invoked, and lays down the requirement that contracts may be changed only by the statutory procedures. ^{2/} The *status quo* provisions of Sections 5, 6, and 10 which we have quoted specify the conditions to be observed by the parties *after* the statutory machinery has been resorted to, and *while* it is in progress.

Finally, Shore Line's argument that the intent of the statutory language was that the phrase "rates of pay, rules or working conditions" was meant to be synonymous with the word "agreements" is completely untenable in the light of Section 5 Third (e) of the Act (45 U.S.C. Sec. 155 Third

^{2/} Section 2 Seventh also operates to attach legal and binding effect to the collective labor agreements which Section 2 First of the Act required the parties to "make and maintain", and to prevent their unilateral change or abrogation by carriers. The status of such agreements as valid, enforceable contracts is a matter as to which there was considerable doubt at the time of enactment of the Railway Labor Act. See *J. I. Case Co. v. National Lab. Rel. Bd.*, 321 U.S. 332 (1944), and annotation at 88 L. Ed. 770, 772-773.

(e)), requiring carriers to file with the Mediation Board copies of contracts covering rates of pay, rules, and working conditions, and also statements of rates of pay, rules and working conditions *not covered by contract*.

2. The decision below gives full effect to the intent of the Railway Labor Act as indicated by its legislative history.

The statutory provisions for the handling of major disputes with which we are here concerned, prescribing "cooling off" periods during which the *status quo* was to be maintained, first appeared in the Railway Labor Act of 1926 (44 Stat. 577). The legislative history of that Act clearly reveals the concern of Congress over the possible adverse effects upon the public and interruptions to commerce arising out of a system allowing rates of pay, rules and working conditions to be arrived at by the free interplay of voluntary collective bargaining between management and labor, rather than by compulsory arbitration or binding decision by a government agency.

The 1926 Act was a unique piece of legislation, in that it was prepared and presented to Congress jointly by railroad management and labor. (*Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks*, 281 U.S. 548, 563, and note 2 (1930).) The *status quo* provisions here involved were included in the bill thus jointly presented, and were accepted by Congress as a measure designed to protect the public against interruptions to commerce. See *Texas & N. O. R. Co. v. Brotherhood R. & S. S. Clerks*, *supra*, at p. 565-566, and note 2 quoting Congressional Committee reports on this phase of the legislation.

Throughout the hearings on the 1926 Act before the House and Senate committees there was extensive testimony as to the scope and purpose of the *status quo* requirements, and this testimony clearly refutes Shore Line's contention that they must be interpreted narrowly, and that the prescribed cooling off periods were only meant to forestall changes prohibited by existing agreements. As Donald Richberg, spokesman for the labor proponents of the bill, stated before the Senate Committee on Interstate Commerce: ^{3/}

" . . . What broader phrase could be used than 'conditions out of which the dispute arose' which comprehends all the elements affecting the controversy? It is intended to make it clear that the parties are going to wait and give the Government full opportunity to adjust the controversy."
(1926 *Senate Hearings*, pp. 88-89.)

And Mr. Richberg testified in similar vein before the House Committee on Interstate and Foreign Commerce, ^{4/} saying:

"The thought was to include in the broadest way all the factors which contributed to what is commonly called the status quo . . . "

^{3/} *Hearings on S. 2306 before the Senate Committee on Interstate Commerce*, 69th Cong., 1st Sess. (1926), hereinafter referred to as the 1926 *Senate Hearings*.

^{4/} *Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. (1926), hereinafter referred to as 1926 *House Hearings*.

....

"... the purpose is to preserve unchanged all the conditions involved in the controversy until there is full opportunity for a presidential investigation and a 30-day report. In other words a full cooling time and opportunity to crystallize public opinion." (1926 *House Hearings*, p. 44.)

Further elaborating on the scope of the *status quo* to be observed, Mr. Richberg testified as follows:

"MR. HOCH. Yes. Now I do not understand and I am not yet entirely satisfied as to the force of those words 'in the conditions out of which the dispute arose.' In answering Mr. Fredericks you used this language, as I recall it: 'Conditions involved in the controversy.' Now I can understand that. That seemed to me to express what is in mind here. But to say, 'the controversy in the conditions out of which the dispute arose' seemed to me still not to be clear.

"Mr. RICHBERG. Let me express the situation this way: It was the desire of those who attempted to work out an agreement on this to have a phrase here which would be broad enough so that in the ordinary interpretation of language in its natural meaning it would be well understood what was intended. It was not the desire of either party to write in at

this section of the bill something that had not been written in anywhere else, and that was an absolute prohibition and a compulsion against one party alone of the bill.

The question was raised as to strikes. This is not a one-sided affair. The conditions out of which a dispute arose are subject to change, not merely by a strike of employees. They are subject to most vital change by their subtle actions on the part of management which it is almost impossible to reach by any prohibition of law. Now, it is very easy, as far as language goes, to say men shall not strike. But it is practically impossible, so far as language goes, to write a specific prohibition upon what the employer shall not do at the same time, and in that situation it seemed that the public interest could be best met by using a phrase which was broad enough to make it perfectly clear what the intentions of the parties were, and at the same time that was not language written for the purpose of hitting one party over the head with a club. Now, we do not want to hit either party over the head with a club, but if there is going to be any club swinging we want it swung equally on both sides.

Now this phrase 'in the conditions out of which the dispute arose.' Let us consider

that for a moment in its judicial interpretation. What are the conditions out of which the dispute arose? The A. B. Railroad is employing so many hundred men, who have applied for an increase of wages, we will say, or the A. B. Railroad has notified so many hundred men that there will be a decrease of wages on a certain day. Negotiations have gone on between the parties, and meanwhile the men have continued to work and the employer has continued to pay them the wages which it was paying. They have not been able to reach an agreement. Now, if the conditions out of which the controversy arose are to be preserved it is perfectly clear that the men must continue in the employment which they are engaged in, or otherwise they are changed from that condition. Then they were employed. The railroad must pay the wages which it was paying, otherwise that condition is changed. The rules which apply to the operations of the men, which could be changed very easily by the railroad, and might change the effect of the wage payments, might change the conditions under which the men were working, those must remain, because they are the conditions that existed when the controversy arose. The kind of service which the men are giving. These are all part of the conditions out of which the controversy arose. Now, you can not take

a specific act which might interfere with or interrupt the transportation which would not amount to a change in the conditions out of which the dispute arose, because transportation was going on when the dispute arose. You would certainly change the conditions if you changed the situation so that the transportation is interrupted. And that is the general purpose you desire to preserve." (1926 *House Hearings*, pp. 55-56.)

Additional elaboration of the foregoing line of testimony by Mr. Richberg is embodied in his remarks at pages 90-94, and 276-277, of the 1926 *House Hearings*.

Throughout the hearings on the 1926 Act there was no dissent by management witnesses from Mr. Richberg's explanation of the scope and purport of the *status quo* provisions contained in the proposed legislation. Indeed, complete agreement between labor and management as to the intent of the proposals was a key feature of the presentation to Congress of the 1926 Act. As stated by A. P. Thom, principle spokesman for the carriers:

"This is a scheme presented here by both parties in good faith as a method of preventing the interruption of transportation. Neither party can afford to have interruption of transportation without resorting to every provision of this bill first" (1926 *Senate Hearings*, p. 29.)

See also additional testimony of Mr. Thom at pages 14, 30-31, and 94 of the 1926 *Senate Hearings*, and pages 113-115 and 144 of the 1926 *House Hearings*.

The committee hearings on the 1926 Act produced much discussion of the *status quo* features of the proposed legislation in addition to the very pertinent testimony referred to above.^{5/} Yet in its discussion (Br., pp. 32-38) of the legislative history of the 1926 Act the Shore Line does not refer to the testimony dealing with the *status quo* provisions here involved, but rather that which related to the importance of having management-labor relations governed by agreement, and of requiring advance notice of the termination of such agreements. This testimony is not at all germane to the principle issue here involved, the scope of the Act's requirements with respect to maintenance of the *status quo* during the processing of major disputes. The thrust of that testimony, rather, was to emphasize the position of both the management and labor proponents of the 1926 Act that voluntary collective bargaining was preferable to compulsory arbitration, and of vital importance to successful labor relations.

Again in referring to the legislative history of the 1934 amendments to the Act (Br., pp. 39-40), Shore Line discusses only matters relating to portions of the Act other than those imposing the *status quo* requirements here in issue. As noted in the first portion of our argument dealing with the language of the statute, neither Section 2 Seventh, nor the introductory sentence of Section 6, purports to set forth any *status quo* duties.

^{5/} See 1926 *Senate Hearings*, pp. 58- 59, 65, 71, and 105; and 1926 *House Hearings*, pp. 18, 100, 197, 200-201, 211, 250-252, 295-296, and 344.

The 1934 amendments were not concerned with the machinery for handling major disputes over the making and changing of agreements, but rather primarily with reinforcing the right of employees to bargain collectively through representatives of their own choosing. (*Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937)), and with the creation of the National Railroad Adjustment Board for the final and binding disposition of minor disputes over the interpretation and application of agreements. The only change in the machinery for handling major disputes was the elimination of a possible loophole in the 1926 Act, to insure continued maintenance of the *status quo* during the period between rejection of the Mediation Board's final proffer of arbitration under Section 5, and the appointment of a Presidential Emergency Board. (*Hearings on H. R. 7650 before the House Committee on Interstate and Foreign Commerce*, 73rd Cong., 2nd Sess. (1934), hereinafter referred to as *1934 House Hearings*, p. 50; *Hearings on S. 3266 before the Senate Committee on Interstate Commerce*, 73rd Cong., 2nd Sess. (1934), hereinafter referred to as *1934 Senate Hearings*, p. 21.) ¹⁶

Aside from the fact that the 1934 amendments referred to by Shore Line do not involve the major disputes machinery of the Act or change the language with which

^{6/} Except for this change, there was general satisfaction with the major disputes machinery of the 1926 Act. Joseph B. Eastman, Federal Coordinator of Transportation, testified, with respect to the proposed 1934 amendments, that "The present machinery for mediation and possible arbitration and for the final appointment of a fact-finding board are left largely unchanged." (*1934 House Hearings*, p. 50.) M. W. Clement, representing all class I railroads in the United States, said that "The Railway Labor Act of 1926, with certain modifications, is nearly a perfect bill" (*1934 House Hearings*, p. 139.)

the *status quo* obligations are described and imposed, the fact is that the 1934 legislative history is devoid of any consideration or discussion of the *status quo* requirements except with respect to the amendment of Section 5, noted above, to assure their continuity between Mediation Board and Emergency Board handling. In view of the importance attached to these requirements in 1926, it is inconceivable that without any consideration or discussion, and in the face of general satisfaction with the existing major disputes machinery, Congress would have tampered with them in 1934. And it is impossible to believe that it would have attempted the narrow delineation of the scope of the *status quo* for which Shore Line contends, and still have described it, in Sections 5 and 10 of the Act, in such terms as "established practices in effect prior to the time the dispute arose", and "the conditions out of which the dispute arose."

3. The decision below is supported by decisions of this Court and other federal courts and there is little pertinent authority to the contrary.

The courts have long recognized the obligations imposed by the Railway Labor Act for the maintenance of the *status quo* until the statutory procedures for the handling of major disputes are exhausted. Thus in *Elgin, Joliet and Eastern R. Co. v. Burley*, 325 U.S. 711, 725, this Court said:

"... The parties are required to submit to the successive procedures designed to induce agreement. Sec. 5 First (b). But compulsions go only to insure that *those*

procedures are exhausted before resort can be had to self-help." (Emphasis supplied.)

That the mandatory duty to bargain collectively in accordance with the procedures of the Railway Labor Act is equally applicable to carriers and their employees is further pointed up by footnotes 12, 18, and 26 to the opinion in the *E., J. & E.* case. (325 U.S. 711, at pp. 721, 725, and 730.)

Other decisions of this Court and other federal courts have recognized both the existence of the requirement to maintain the *status quo* during the handling of major disputes, and its applicability to railroads as well as their employees. One of the most recent decisions in point is that in *Brotherhood of Loc. Eng. v. B. & O. Co.*, 372 U.S. 284 (1963), where the court quoted its previous language (above) from the *E., J. & E.* case, and reaffirmed the proposition that the question of whether the major disputes handling procedures had been exhausted was determinative of a carrier's right to proceed with changes in the *status quo*. The principle was reiterated in *Railway Employees v. Florida E. C. R. Co.*, 384 U.S. 238 (1966). See also the decision of the Court of Appeals for the Fifth Circuit in the same litigation, reported as *Florida E. C. Ry. Co. v. Brotherhood of R. Trainmen*, 336 F. (2d) 172, and cases cited.

Additional cases have recognized the principle. Thus, in *Manning v. American Airlines, Inc.*, 329 F. (2d) 32, (C.A. 2. 1964), the court said:

“The propriety of an injunction to enforce the then unique provisions of the Railway Labor Act for maintaining the *status quo* while the parties to a labor dispute pursue various stages of negotiation, mediation, or arbitration, was established long ago. *Texas & N. O. R. R. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, 565-566, 50 S. Ct. 88, 74 L. Ed. 608 (1930). Although the *Texas & N. O.* decision antedated the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, the debates on that Act, 75 Cong. Rec. 5503-04 (1932), made clear that it was not intended to apply to injunctions of this nature. See *Railroad Yardmasters v. Pennsylvania R. R.*, 224 F. 2d 226 (3 Cir. 1955); *Chicago, R. I. & P. R. R. v. Switchmen's Union*, 292 F. 2d 61, 63-64, 66 (2 Cir. 1961), Cert. denied, 370 U.S. 936, 82 S. Ct. 1578, 8 L. Ed. 2d 806 (1962).”

And, in concluding its opinion, the court remarked:

“The purpose of Section 6 was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted”

Similarly, in *Brotherhood of Railroad Trainmen v. Akron & B. B. R. Co.*, 385 F. (2d) 581, 597 (C.A.D.C., 1967), cert. den. 390 U.S. 923, the court observed:

“ . . . If we turn from speculation about legislative intent to the realities of the

Railway Labor Act, we are aware that the conferences triggered by Section 6 notices are typically the beginning and not the end of the statutory procedures. If conferences proposed by a Section 6 notice are unavailing either party can invoke the services of the National Mediation Board. *While negotiations continue or the Board has jurisdiction, no self-help is permitted.* The parties are free to submit their controversy to arbitration. If none of these techniques resolves the matter, the President may convene an emergency board to investigate the dispute and report back on the issues. *Only when all these steps have been exhausted are the parties free to act unilaterally.*" (Emphasis supplied.)

Another very recent decision squarely in point on the issues here involved is that of the Northern District of Illinois in *Illinois Central R. Co. v. Brotherhood of Locomotive Engineers*, No 68C1382, April 24, 1969, unofficially reported at 71 LRRM 2035.^{7/} The following language from the court's opinion is most pertinent here:

"The Court has observed that in Section 2 Seventh the prohibition is against a change by the carrier of 'working conditions . . . as embodied in agreements'. The final determination of

^{7/} Labor Relations Reference Manual, a publication of the Bureau of National Affairs, Washington, D.C.

whether such a change has occurred is a question for the National Railroad Adjustment Board.

“But once a Section 6 notice has been served the prohibition is against a change by the carrier of ‘working conditions’ until the Mediation Board gives written notice of the failure of its efforts, and for thirty days thereafter (unless procedures of arbitration or of an emergency board are under way) ‘ . . . no change shall be made in . . . working conditions or established practices in effect prior to the time the dispute arose.’ ” (71 LRRM, p. 2038.)

“The status quo language contained in Section 5 and in Section 10 of the Act appears to follow the general understanding of status quo — the last actual, peaceable, non-contested condition of the parties (see Words and Phrases, Permanent Edition, Vol. 40., Page 133).

“The Court therefore interprets the status quo provisions of Section 6 of the Railway Labor Act in its use of the phrase ‘working conditions’ to include ‘established practices in effect prior to the time the dispute arose,’ as found in Section 5, and ‘conditions out of which the dispute arose,’ as found in Section 10.

“The Court, in passing on a request for an injunction against a strike, has juris-

diction to determine what were the working conditions, established practices in effect prior to the time the dispute arose, and conditions out of which the dispute arose. The exercise of such jurisdiction does not conflict with the exclusive jurisdiction of the National Railroad Adjustment Board to determine 'disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions (45 USC 153 First (i)).'

"The Court concludes that neither the Illinois Central nor the Brotherhood may change 'working conditions' until the National Mediation Board has finally acted upon the dispute stated in the Section 6 notice of June 3, 1968, and that 'working conditions' includes 'established practices in effect prior to the time the dispute arose' and 'conditions out of which the dispute arose.'"

Another case supporting the decision below is that involved in the three successive decisions by the Court of Appeals for the Fifth Circuit, *United Ind. Wkrs. of Seafarers I. U. v. Board of Tr. of Galveston Wharves*, 351 F. (2d) 183 (1965), 368 F. (2d) 412 (1966), and 400 F. (2d) 320 (1968), cert. den. May 19, 1969, U.S., 23 L. Ed. (2d) 219, discussed in the brief of the *amicus curiae*, Railway Labor Executives' Association, at pp. 12-14. There the court not only enforced the carrier's obligation to

maintain the *status quo* pending exhaustion of the Act's major disputes machinery, but fashioned relief to restore the *status quo* when the change in working conditions had actually been consummated by the carrier.

Additional cases which support the decision of the court below, requiring plaintiff to maintain the *status quo*, are *Atlantic Coast Line R. Co. v. Brotherhood of Rail. Train.*, 262 F. Supp. 177, 180-181; *Spokane, Portland & Seattle Ry. Co. v. Order of Railway C. & B.*, 265 F. Supp. 892, 894; *Butte, Anaconda & Pac. Ry. Co. v. Brotherhood of L. F. & E.*, 168 F. Supp. 911, aff'd. 268 F. (2d) 54 (C.A. 9, 1959); and *Baltimore & Ohio R. Co. v. United Railroad Wkrs.*, etc., 271 F. (2d) 87, 90 (C.A. 2, 1959).

In spite of the repeated decisions holding the *status quo* requirements of the Act to be equally binding on both parties, carriers as well as employees, Shore Line argues that Section 2 Seventh only requires it to resort to the agreement-changing procedures of Section 6 when the current agreement would not permit it to make a contemplated operating change. The absence of such a Section 2 Seventh prohibition, of course, would not mean that a unilateral change in working conditions such as that here involved would not violate any other obligations of the carrier under the Act, such as the general duty of good faith collective bargaining. But in any event it does not follow that the *status quo* requirements have no application when Section 6 is invoked by the employees. That BLF&E served a Section 6 notice, dealing with the precise subject matter of the change in working conditions which Shore Line claims it could effect unilaterally, and that the National Mediation Board accepted jurisdiction of the dispute, is not in question. The *status quo* requirements of the machinery

of Sections 6, 5, and 10 thus set in motion are explicit, and not limited to the terms of existing contracts.

Here as in the court below, Shore Line relies heavily on the case of *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942). The facts and issues in that case are not remotely analagous to those presented here. There was no existing collective bargaining agreement in effect, nor any prior history of bargaining; *the National Mediation Board had not taken jurisdiction; there was not even any pending demand for an agreement on the subject matter of the change put into effect by the carrier*; and the case dealt primarily with statutory minimum wage requirements of the then newly enacted Fair Labor Standards Act.

The *Williams* litigation was a consolidation of two cases, the second being known as the *Pickett* case and involving the Dallas Terminal. The Fair Labor Standards Act became effective October 24, 1938. On October 11, 1938, the red caps at the Dallas Terminal notified the latter that the red caps had selected the Brotherhood of Railway and Steamship Clerks to be their representative and that the Clerks' general chairman was a man named Pickett. The latter promptly notified management that he desired a conference for the purpose of negotiating a collective agreement. On October 22, 1938, the management delivered to each red cap a letter informing him that he must report weekly the amount of tips received, and that the management would pay such additional sums weekly to each red cap as would guarantee to the red cap the minimum wage required by the Act. On October 24, 1938, Pickett protested the carrier's letter. Nevertheless, the red caps continued to work and comply with the management's letter of October 22, 1938.

On December 26, 1938, Pickett submitted to the Dallas terminal a proposed general agreement covering hours of service and working conditions, *but not the subject of wages*. On December 6, 1939, the terminal informed Pickett that the problem created by the tips was in litigation, and when the matter was settled it would reach an agreement with the Clerks. On January 1, 1940, a collective agreement was signed, *omitting the subject of wages*. Later a suit was brought by Pickett against the terminal to recover wages due the red caps under the Fair Labor Standards Act.

The plaintiff contended that the terminal could not lawfully impose upon the red caps the conditions set forth in its letter of October 22, 1938, because to do so violated the Railway Labor Act. The argument relied on was that since the Brotherhood requested the Dallas Terminal on October 11, 1938, to negotiate a collective agreement, the terminal could not thereafter lawfully impose upon the individual red caps the conditions set forth in the terminal's October 22, 1938, letter. This Court rejected that contention. It held that when the red caps continued to work after receiving the October 22, 1938, letter with its conditions, an individual contract between each red cap and the terminal resulted as a matter of law. The Court concluded that the Railway Labor Act did not prevent that result, on the following reasoning:

" . . . This employment of the red caps was at will and subject to the employers' conclusions as to the desirability of continuing their employment . . . " (315 U.S. p. 397.)

“With the effective date of the Act the employers became bound to pay a minimum wage to their employees, the red caps. Accordingly the latter were notified that future earnings from tips must be accounted for and considered as wages. Although continuously protesting the authority of the railroads to take over the tips, the red caps remained at work subject to the requirement *By continuing to work a new contract was created*” (315 U.S. p. 398; emphasis supplied.)

“ . . . Independent individual contracts are not affected by the [Railway Labor] Act ” (315 U.S., p. 399.)

After concluding that the bargaining provisions of the Railway Labor Act were limited to collective action, the Court said:

“ . . . Because the carrier was, by the act, placed under the duty to exert every effort to make collective agreements, it does not follow that pending those negotiations, where no collective bargaining agreements are or have been in effect, the carrier cannot exercise its authority to arrange its business relations with its employees in the manner shown in this record. As we have stated in discussing the Jacksonville case, the Railway Labor Act dealt with collective bargaining agreements only and not with the employment

of individuals. This conclusion is pertinent in considering the effect of the Dallas request for collective bargaining." (315 U.S., p. 402.)

This rationale of the *Williams* decision would appear to be of doubtful validity in the light of the companion decisions of this Court, two years later, in *J. I. Case Co. v. National Lab. Rel. Bd.*, 321 U.S. 332 (1944) and *Order of R. Telegraphers v. Railway Exp. Agency*, 321 U.S. 342 (1944), holding invalid individual employment contracts negotiated in the face of the duty to bargain collectively.

The other decision of this Court cited by petitioner as contrary to the decision below, *Order of Railroad Conductors v. Pitney*, 326 U.S. 561 (1946), did not involve the question of a carrier's right to make unilateral changes during negotiations or mediation pursuant to a union's Section 6 notice, but rather the question of whether existing agreements controlled the subject matter of the changes, so that the *carrier* could not put them into effect without seeking amendment of the existing agreements pursuant to Section 6. As we have noted above, the decision below does not hold that absent a pending major dispute being progressed in accordance with the Act, a carrier may not make operating changes not barred by existing agreements.

Petitioner Shore Line has cited a number of lower federal court decisions where the claimed conflict with the decision below is similarly without merit when the facts and actual holdings of the courts are examined.

Thus, *Hilbert v. Pennsylvania R. Co.*, 290 F. (2d) 881 (C.A. 7, 1961), and *Rutland Ry. Corp. v. Brotherhood of*

Locomotive Eng., 307 F. (2d) 21 (C.A. 2, 1962), involved minor as well as major disputes. They involved Section 6 notices served by the carrier, not the union, and the changes in working conditions were put into effect by the carriers under a claim that they were permitted under existing agreements, thus creating minor disputes for the National Railroad Adjustment Board. In *Illinois Central R. Co. v. Brotherhood of Railroad Train.*, 398 F. (2d) 973 (C.A. 7, 1968), it appears from the *per curiam* opinion of the Court of Appeals that the end product of the litigation was a remand of the case to the District Court for entry of an appropriate *status quo* order preserving established practices which a statutory arbitration board, Public Law Board No. 79, had found, during the pendency of the appeal, to be as contended by the Brotherhood. And the case of *Southern Ry. Co. v. Brotherhood of Locomotive Firemen, etc.*, 337 F. (2d) 127 (C.A.D.C. 1964), like the *Hilbert* and *Rutland* cases, involved a Section 6 notice by the carrier, and an injunction requiring the carrier to maintain the *status quo* alternatively until the major disputes procedures had been exhausted, or until an award of the National Railroad Adjustment Board might establish, by interpretation of existing agreements, that the carrier could have put the operating changes into effect without seeking amendment of its agreements under Section 6. Again, the case does not hold that a carrier may make unilateral changes in the subject matter of pending negotiation or mediation on a union's Section 6 notice. Finally, the case of *Norfolk & P.B.L.R. Co. v. Brotherhood of Rail. Train.*, 248 F. (2d) 34 (C.A. 4, 1957), is not in point. It involved a dispute jurisdiction of which had been refused by the Mediation Board, and simply held that it was unlawful for the Brotherhood to strike over what was held to be a minor dispute.

The unreported District Court opinions reproduced in the appendix to Shore Line's petition are similarly unpersuasive because of the factual situation and actual holdings involved.

The statement contained in a series of reports^{8/} of the National Mediation Board, quoted in the Shore Line's brief (pp. 15-16) patently misstates the actual *status quo* provisions of Section 6 of the Act, gratuitously reading into the statute the limiting phrase "as expressed in agreements" to describe those rates of pay, rules or working conditions which the carriers are prohibited from altering. No such phrase appears in Section 6. Moreover, the statement was not made in connection with any adversary proceeding before the Board, cited no authority, and amounts to no more than a conclusion on an aspect of the Railway Labor Act over which the Board possesses no adjudicatory authority. The courts, and not the Mediation Board, are the tribunals charged with the responsibility of enforcing the commands of the Railway Labor Act. The only fact-finding powers of the Board lie in the area of representation disputes. With respect to those portions of the Act dealing with major disputes, and embodying the *status quo* provisions, its functions are mediatory and non-decisional.

The courts have recognized and enforced the Act's *status quo* requirements against carriers as well as their employees, and have not limited their scope to the narrow confines of existing agreements. Such was the clear intention of the framers of the statute, whose concern was to convince Congress that the statutory scheme of settling

^{8/} The Board's reports cited at page 16 of Shore Line's brief have simply reiterated, as matter of routine, the same statement.

major disputes by purely voluntary measures still afforded ample protection to the public, by use of the broadest possible *status quo* provisions.

4. **The decision below gives effect to the Railway Labor Act's primary purpose of avoiding interruptions to commerce by placing upon management and labor alike conditions to be observed in the voluntary settlement of their disputes.**

It is a well known fact that precipitous changes made by management in rules of employment or working conditions are frequently the cause of serious disputes between labor and management, and lead to strike threats and strike action. An interpretation of the Act which prevents management from changing an existing employment rule, condition or practice when such rule, condition or practice is currently the subject of collective bargaining, is essential to promote and achieve the ultimate purpose that the Congress sought to achieve when it enacted the Railway Labor Act.

The *status quo* provisions of the Act, in Sections 5, 6 and 10, are the means chosen by Congress for this objective, and it intended them to be broad in scope. When the Act's machinery for the handling of major disputes is set in motion by the service of a Section 6 notice, the carrier may not proceed forthwith to make the very change in working conditions that the union is seeking to prohibit or restrict, while at the same time requiring the union to stay its hand for the statutory period.

The incentive to make the collective bargaining process effective will in large part be thwarted if the carrier can

"jump the gun", and take the very action that a union's Section 6 notice proposes that the carrier not take, or take only when accompanied by the observance of certain conditions. Such action by a carrier would clearly signal its lack of any intention to bargain seriously about whether it would enter into an agreement not to make the involved change in working conditions. And it would be obvious to the union that it was not going to achieve its objectives without a strike to force the carrier to undo what was already done, and that the Act's mandatory major disputes procedures simply consisted of "going through the motions" in order to mature the right to strike.

The Shore Line argues (Br., p. 41) that the decision below will interfere with and delay the institution of operational changes to promote efficiency in the railroad industry. This argument comes with ill grace from this petitioner. Its right to make the changes in question was fully matured upon the processing to a conclusion of BLF&E's first Section 6 notice. But the union's right to use self-help had also matured, so Shore Line announced abandonment of its intentions to start assignments out of Trenton, and subsequently established assignments at Dearoad, asserting that this move was not within the compass of the matured dispute. BLF&E, having withdrawn its original Section 6 notice, was forced to file a new one when Shore Line again moved to establish assignments operating out of Trenton. (Statement of the Case, *supra*.)

But perhaps the best answer to Shore Line's concern about delayed operating efficiency is expressed in the following language from this Court's opinion in the case of *Railroad Telegraphers v. Chicago & N. W. R. Co.*, 362 U.S. 330 (1960):

“... In other legislation, however, like the Railway Labor and Norris-LaGuardia Acts, Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service. It passed such Acts with knowledge that collective bargaining might sometimes increase the expense of railroad operations because of increased wages and better working conditions. It goes without saying, therefore, that added railroad expenditures for employees cannot always be classified as ‘wasteful.’ It may be, as some people think, that Congress was unwise in curtailing the jurisdiction of federal courts in railroad disputes as it did in the Norris-LaGuardia Act. Arguments have even been presented here pointing to the financial debilitation of the respondent Chicago & North Western Railroad and to the absolute necessity for the abandonment of railroad stations. These arguments, however, are addressed to the wrong forum. If the scope of the Norris-LaGuardia Act is to be cut down in order to prevent ‘waste’ by the railroads, Congress should be the body to do so. Such action is beyond the judicial province and we decline to take it.” (362 U.S. p. 342.)

The decision below does not, as Shore Line argues, operate to “destroy existing rights”, unless it be said that the Railway Labor Act does this by imposing the manda-

tory duty to bargain collectively, subject to "cooling off" periods, which Congress has seen fit to impose on management and labor alike. What is involved here is merely postponement of action which a carrier wishes to take, in order to permit completion of the procedures which Congress has said must be followed in major disputes in the railroad industry. Upon completion of these procedures without agreement having been reached, either party is of course free to act unilaterally.

5. The decision below may be sustained as a proper exercise of injunctive power to enforce the duty of good faith bargaining, and of equitable discretion to protect the jurisdiction of a statutory administrative tribunal.

The decision below may also be sustained for reasons apart from the express *status quo* requirements of the Act. It is, of course, well established that grounds not considered by a lower court may be urged on appeal for the purpose of seeking affirmance of the judgment appealed from. *Langnes v. Green*, 282 U.S. 531 (1931; *LeTulle v. Scofield*, 308 U.S. 415 (1940).

This Court has squarely held that the duty to bargain collectively carries with it the requirement to refrain from unilateral action, during the bargaining process, with respect to the subject matter being negotiated. In *N.L.R.B. v. Katz*, 369 U.S. 736, 743 (1962), the Court said:

" . . . We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation

of Section 8 (a) (5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8 (a) (5) much as does a flat refusal."

To similar effect is the Court's decision in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1966), sustaining an order of the National Labor Relations Board "... restoring the status quo ante to insure meaningful bargaining ..." (379 U.S. at p. 216).

That the Railway Labor Act's commands with respect to the duty to bargain collectively will be enforced by injunctive decree is well settled. *Virginian Railway v. System Federation No. 40*, 300 U.S. 515 (1937). The duty to bargain aspect of this case is thoroughly discussed in the brief filed by the Railway Labor Executives' Association, and will not be elaborated here.

The opinion of the District Court, adopted by the Court of Appeals below on the *status quo* issue (A. 168), justified its ruling on the ground, among others, that the jurisdiction of the National Mediation Board should be protected by the application of the *status quo* provisions of the Act whenever it was mediating a dispute (A. 162). The reports of the National Mediation Board certainly carry no implication that its effective handling of a major dispute would not be aided by the maintenance of the *status quo*, or that it would not be hampered by unilateral action with respect to the very subject matter of the dispute which it was attempting to mediate.

Even in minor disputes this Court has upheld the issuance of injunctions to preserve the *status quo* to protect the jurisdiction of the administrative tribunal. *Brotherhood of L.E. v. Missouri-Kansas-T R. Co.*, 363 U.S. 528

(1960), p. 534-535; *Brotherhood of R. T. v. Chicago R. & I. R. Co.*, 353 U.S. 30 (1957). (Compare *Manion v. Kansas City Terminal Railway Co.*, 353 U.S. 927 (1957), where the Court vacated an injunction because the dispute was not pending before the National Railroad Adjustment Board.) The Court's reasoning on this point and balancing of the equities as set forth in its opinion in the *M.K.T.* case, supra, at 363 U.S., pp. 534-535, could aptly be applied to the facts and circumstances here.

Just as it would operate to destroy effective collective bargaining, unilateral carrier action on the subject matter of a dispute in mediation would reduce the functions of the National Mediation Board to a process of merely going through the motions preparatory to a legal exercise of the right to strike, and destroy the protection which Congress intended to afford the public when it adopted the *status quo* and cooling off provisions of the Act.

CONCLUSION

For the foregoing reasons it is submitted that the decision of the court below was correct and should be affirmed.

Respectfully submitted,

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**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969**

No. 29

**THE DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY, *Petitioner,***

v.

**UNITED TRANSPORTATION UNION, *et al.,*
*Respondents.***

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

REPLY BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR PETITIONER

The question before the Court is whether Section 6 of the Railway Labor Act (45 U.S.C. § 156) precludes a railroad from taking action allowed by its collective bargaining agreement during the pendency of a union proposal to amend the agreement to forbid such action. In our opening brief, we set forth the reasons for our view that Section 6 does not preclude such action and that the status quo provision of that section simply extends the life of the agreement pending negotiations for change. This construction of Section 6, as we have indicated, has been endorsed repeatedly by the National Mediation Board, the agency

charged with responsibility for dealing with railway labor controversies and accordingly the agency in the best position to come to an informed and disinterested judgment on the status quo issue as it affects the public interest. (Br. pp. 14-18.) Moreover, the Board's view of Section 6 is supported by numerous and virtually uniform decisions of the courts, including this Court (Br. pp. 18-28); it accords with the purpose of the Congress, manifested both in the text and scheme of the Railway Labor Act (Br. pp. 28-32) and in the legislative history of Section 6 (Br. pp. 32-40); and it makes sense—the contrary rule followed by the court below would obstruct needed operational changes indefinitely and would stultify collective bargaining (Br. pp. 40-45).

The unions take quite a different, and quite an oblique, approach to the case.¹ As to the National Mediation Board, the unions simply dismiss its judgment as misguided (Resp. Br. pp. 36-37; R.L.E.A. Br. pp. 20-21), so no more need be said about that. As to the statute, they argue that, while the question presented turns upon the meaning of Section 6, the answer is to be found, not in the language and legislative history of that provision, upon which we rely, but rather in the language of two other provisions—Sections 5 and 10—and particularly in the legislative history of the latter. But, as we show in this reply, the status quo provisions of Sections 5 and 10 are not applicable to this case. When they are applicable to a major dispute—after the Mediation Board terminates its services or an emergency board is appointed—they require only that the parties abide by the rules established by their pre-existing agreements. And if that were not the case, the considerations that might lead to a contrary conclusion would serve only to confirm our interpretation of Section 6.

¹ We employ the term "unions" herein to refer both to respondent and amicus, the Railway Labor Executives Association.

We also deal in this reply with collateral arguments of the unions. Thus, we show that the judicial decisions upon which they rely had nothing to do with the scope of the parties' obligation to maintain the status quo, the issue involved in this case, but instead stated only in general terms the incontestible principle that *both* parties to railway labor disputes share that obligation. We also demonstrate the want of merit of the unions' newly devised argument that, even if the decision below is not supported by Section 6 of the Act, it can be supported by Section 2 First, which imposes the duty to bargain on railroads and unions. That contention is not encompassed within the question presented; was neither pleaded nor proved below; is not supported by findings; and cannot be sustained on the record and facts in this case.

1. *The text and history of the Railway Labor Act.* In their briefs, the unions point out, correctly, that there are four status quo provisions in the Railway Labor Act—in Sections 2 Seventh, 5 First, 6 and 10. Section 2 Seventh prohibits changes in "rates of pay, rules, or working conditions . . . as embodied in agreements except in the manner prescribed . . . in Section 6 . . ." (45 U.S.C. § 152 Seventh). Section 6 requires service of a notice of "an intended change in agreements affecting rates of pay, rules, or working conditions," and provides that during the pendency of the notice, the "rates of pay, rules, or working conditions shall not be altered" until "the controversy has been finally acted upon as required by Section 5 . . . by the Mediation Board . . ." (45 U.S.C. § 156). Section 5 First, provides that if mediation fails, the Mediation Board "shall at once endeavor as its final required action . . . to induce the parties to submit their controversy to arbitration" and—

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory

efforts have failed and for thirty days thereafter . . . no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose." (45 U.S.C. § 155.)

Thereafter, under Section 10, the President may appoint an emergency board, which has thirty days in which to make its report. "After the creation of such board and for thirty days after such board has made its report . . . , no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose" (45 U.S.C. § 160).

The unions cannot and do not dispute that the only status quo provisions of the Act which are directly involved in this case are those in Section 2 Seventh and Section 6. The dispute has not reached, and may never reach, the stages which bring into operation the status quo provisions in Section 5 (the termination by the Mediation Board of its services) and in Section 10 (the appointment of an emergency board). So far as this case is concerned, the language and legislative history of, and policy considerations respecting, Sections 2 Seventh and 6, as well as the decision by this Court in *Williams v. Terminal Co.*, 315 U.S. 386 (1942), numerous decisions of lower courts, and the views of the Mediation Board, all support our position that those status quo provisions require only that the parties continue to abide by the rules established by their pre-existing agreements. We dealt with these matters in our opening brief.

The unions rely, however, on the language of the status quo provisions of Sections 5 and 10 and on the legislative history of Section 10—the only history of the 1926 Act dealt with in the unions' briefs (Resp. Br. pp. 11-17)—as aids to the interpretation of Section 6. (See Resp. Br. pp. 8-19; R.L.E.A. Br. pp. 17-20.) But there is nothing in either the language or the legislative history of those provisions that undercuts our view respecting the reach of Section 6.

That is so for two reasons. In the first place, assuming that Sections 6, 5 and 10 should all be read to mean the same thing, so far as their scope is concerned, the only reasonable construction to be placed upon them is that maintenance of the status quo means simply the adherence to pre-existing agreements. And in the second place, even if Sections 5 and 10 somehow could be construed to impose a broader obligation, that could only be justified, as we show below, on grounds that are not applicable to Section 6 and which therefore serve only to confirm our construction of that section. We discuss these points briefly in turn.

a. The unions' primary reliance is upon the language and legislative history of Section 10, which prohibits changes "in the conditions out of which the dispute arose" for 30 days after the appointment of an emergency board and for an additional 30 days after its report. That language is wholly consistent with the position we take respecting Section 6. The "condition" out of which the dispute in this case arose was the right of the Shore Line to establish new reporting points. It was in order to do away with or change that right—that "condition"—that the union served its Section 6 notice. To take that right away from the carrier while the Section 6 notice is being processed through the procedures of the Act thus would in itself change the "conditions" out of which the dispute arose, not preserve those "conditions." Nor does the testimony of Donald Richberg conflict with this reading of Section 10. The only examples of changes in "conditions" put forward by him, other than the calling of strikes or the institution of lockouts, related to situations, such as changes in wages, that normally would involve changes in existing agreements.²

² We believe, moreover, that an examination of all the lengthy explanations made by Mr. Richberg and others concerning the purposes of Section 10, cited in Respondent's Brief (pp. 12, 13, 16, 17 and n. 5) will reveal

As for Section 5, the unions rely upon the reference in that provision to "established practices." Thus, Section 5 provides that "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose" for 30 days after the Mediation Board terminates its services. Initially, we note that even if the term "established practices" refers to something other than practices established by express or implied agreements, and even if that term could be read back into Section 6, so as to apply to this major dispute at this time, the Shore Line should win. Prior to the time of service of the Section 6 notice here in question, the Shore Line changed reporting assignments to Dearoad, which was even farther from Lang Yard than is Trenton. For some years, there had been no occasion for the carrier to consider the establishment of outlying assignments prior to the developments that led to the establishment of the Dearoad assignments. See our opening brief at pp. 4-5. Accordingly, the only "established practice" prior to service of the Section 6 notice, however that phrase be read, was that Shore Line established reporting points where it wanted them. If that right was not otherwise "established," it was *conclusively* established by the decision of the Special Board of Adjustment (A. 110).

But in our view the most reasonable construction of Section 5 is that it does not expand the status quo requirements in major disputes, at any stage, beyond the preservation and continuation of contractual rights. In the first place, if it be assumed that the Congress meant the phrase "established practices" to apply to major disputes at all,

that their only real concern was to prevent the parties from resorting to self-help, such as strikes and lockouts, whereby one side would bring economic pressure upon the other so as to coerce the other into an agreement even before the emergency board made its report or during the limited period thereafter—30 days—in which the parties were expected to attempt to settle their dispute in an amicable manner in the light of that report.

the existence of a contractual right, as in the case at bar, "establishes" the "practice" with respect to the subject matter of the right.³ But in the second place, in our view the Congress did not mean to affect major disputes at all when it included the phrase "established practices" in the status quo provision of Section 5. If one looks to Section 5 First in its entirety, he will find that since 1934, when the status quo provision was also added, the statute has provided for mediation in two classes of cases: "(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference," and "(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused." It seems fairly apparent that the status quo provision relates to class (a) in requiring no change to be made in "rates of pay, rules, or working conditions," and relates to class (b) in adding, in the disjunctive, "or established practices." The Act consistently refers to changes in "rates of pay, rules, or working conditions" where major disputes are concerned, without any reference to "established practices." This is true not only in Section 6 and Section 5 First (a), but also in Section 2(4), Section 2 First and Section 2 Seventh.⁴

³ We note that the word "established" in the phrase "established practices" must add something beyond the continuation of a course of conduct over a period of time or it would be superfluous, since, as reference to any standard dictionary will demonstrate, "practice" itself means, essentially, a continued course of conduct.

⁴ Moreover, the only explanation in the legislative history concerning the status quo provision in Section 5 supports our view. The status quo provision in Section 5 was added to Section 5 in 1934 to fill the hiatus between the status quo provisions of Sections 6 and 10 left by the 1926 Act. Joseph B. Eastman, Federal Coordinator of Transportation, the principal draftsman and proponent of the 1934 amendments, testified: "As the present act reads, a railroad, by rejecting the Board of Mediation's final recommendation to arbitrate the dispute, is enabled to change the rates of pay, rules, or working conditions arbitrarily, prior to the issuance of an order

b. But whether we or the unions are correct in our respective views of Sections 5 or 10 is not really material in this case, and accordingly need not be decided by the Court. Even if the Congress intended Sections 5 and 10 to impose somewhat broader obligations than we believe, there would be no basis for inferring that the Congress intended also that Section 6 be co-extensive. On the contrary, the only policy considerations that might be deemed to support a broader interpretation of Sections 5 and 10 are inapplicable to Section 6.

These policy considerations focus upon critical differences between these provisions in terms of the time periods during which they are applicable and the points in the negotiating process at which they come into play. Because of these differences, it might be not unreasonable to suspend in some fashion contractual rights under Sections 5 or 10; but it would be most unreasonable to suspend them under Section 6. Thus, the status quo provision of Section 6 becomes applicable at the very first stage in negotiations, when a proposal to change an agreement is first made, and remains applicable through the conferences and mediation prescribed by Sections 5 and 6. That period of time is frequently a year or two, is not infrequently longer, and is "purposely long and drawn out, based on the hope that reason and practical considerations will provide in time

by the President appointing a fact-finding board and maintaining the status quo for 30 days. The only way the employees can now guard against this possibility is for them to be forehanded and arm themselves with a strike vote prior to the termination of mediation, obviously a very unsatisfactory expedient, so as to enable the Board of Mediation to certify to the President that an interruption to interstate commerce threatens, thus enabling him in turn to issue an executive order before the railroads can change the status quo. The railroads have taken advantage of this unintentional hiatus in the present law in several instances. The change now proposed is designed to plug this hole." *Hearings on S. 3266 Before the Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess., p. 21 (1934); see *American Airlines, Inc. v. Air Line Pilots Ass'n*, 169 F. Supp. 777, 789 (S.D. N.Y., 1958).

an agreement that resolves the dispute." *Railway Clerks v. Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966). In contrast, the status quo provision of Section 5 is applicable only for 30 days following the termination of services by the National Mediation Board, and the status quo provision of Section 10 is applicable only for the 30-day period of emergency board proceedings and for an additional 30 days thereafter. Thus, not only are those periods of time sharply circumscribed, but they occur only in the most intractable of disputes—those in which conferences and mediation have failed to produce agreement. Those are the only disputes, of course, in which strikes and lockouts are an imminent prospect if agreement is not reached, so that the public interest in avoiding disruption of transportation is immediately threatened. Thus, they are the only disputes in which the public interest may arguably be deemed to justify serious encroachments upon the parties' contractual rights and the carrier's freedom to make needed operational changes. Even if we assume, as the unions argue, that the Congress determined, during these crucial periods, to impose more stringent limitations upon changes than are imposed by the rules established by the parties' agreements, there is no basis whatever for concluding that the Congress also intended to wipe out the right of the carriers to take actions authorized by the collective bargaining agreements during the entire course of negotiations simply because a union has mailed out a proposal to change the agreement. It offends common sense to believe that the Congress intended such interference with the parties' contractual rights during the indefinite, but prolonged, period to which the status quo provision in Section 6 is applicable.

In short, however Sections 5 and 10 are viewed, neither their language nor their legislative history affords the unions any support in this case.

2. *Precedents.* In their briefs, the unions have cited a number of cases in connection with their discussion of the status quo provisions of the Railway Labor Act (Resp. Br. pp. 19-26; R.L.E.A. Br. pp. 21-22). Of these, only three involved the question presented here and they are not persuasive.⁵ A fourth, *Manning v. American Airlines, Inc.*, 329 F.2d 32 (2d Cir., 1964) supports the Shore Line, not the unions. (See our opening brief at pp. 10-11, 14-15.) The rest of the decisions cited by the unions are directed to showing that "the status quo requirements of the Act [are] equally binding on both parties, carriers as well as employees" (Resp. Br. p. 25).⁶ Of course they are, but that is irrelevant. The issue here is not whether the Shore Line is subject to the status quo provisions of the Act, which it

⁵ Two of these—*Spokane, Portland & Seattle R. Co. v. Order of Railway C. & B.*, 265 F. Supp. 892 (D. D. C., 1967), hearing on final order, Pet. App. 64a-67a; and *Illinois Central R. Co. v. Brotherhood of Locomotive Engineers*, 299 F. Supp. 1278 (N.D. Ill., 1969), appeal pending, No. 17712 (7th Cir.)—are discussed in our opening brief at p. 27, n. 12. In the third—*Chicago & W. I. R. Co. v. Brotherhood of Clerks*, 221 F. Supp. 561 (N.D. Ill., 1963)—the Clerks Union advanced contentions similar to the unions' contentions here but the Court's conclusions with respect to those contentions are unclear.

⁶ See *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 725 (1945) (Resp. Br. pp. 19-20); *Locomotive Engineers v. B. & O. R. Co.*, 372 U.S. 284 (1963) (Resp. Br. p. 20); *Railway Clerks v. Florida E. C. R. Co.*, 384 U.S. 238 (1966), affirming in part and reversing in part 336 F.2d 172 (5th Cir., 1964) (Resp. Br. p. 20); *Brotherhood of Railroad Trainmen v. Akron & B. B. R. Co.*, 385 F.2d 581, 597 (D. C. Cir., 1967) (Resp. Br. pp. 21-22); *United Ind. Wkrs. of Seafarers I.U. v. Board of Tr. of Galveston Wharves*, 351 F.2d 183 (5th Cir., 1965), 368 F.2d 412 (5th Cir., 1966), 400 F.2d 320 (5th Cir., 1968) (Resp. Br. pp. 24-25); *Atlantic Coast Line R. Co. v. Brotherhood of Rail. Train.*, 262 F. Supp. 177 (D. D. C., 1967), reversed, 383 F.2d 225 (D. C. Cir., 1967) (Resp. Br. p. 25); *Butte, Anaconda & Pac. Ry. Co. v. Brotherhood of L.F. & E.*, 168 F. Supp. 911 (D. Mont., 1958), aff'd, 268 F.2d 54 (9th Cir., 1959); *Baltimore & O. R. Co. v. United Railroad Wkrs.*, 271 F.2d 87 (2d Cir., 1959). To these citations, respondent could well have added this Court's recent decision in *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 378 (1969) ("While the [major] dispute is working its way through these stages, neither party may unilaterally alter the status quo. §§ 2 Seventh, 5 First, 6, 10.").

clearly is, but whether the Shore Line violated those provisions by taking action allowed by the parties' agreements. The decisions cited by the respondent have nothing to do with that question, with the exceptions noted above. Accordingly we stand by the statement in our opening brief that until the decision of the District Court in this case, virtually all relevant precedent supported the long-established interpretation of Section 6, an interpretation which we believe to be correct.¹

3. *The duty to bargain.* The unions' principal remaining

¹ For the most part, our opening brief (pp. 18-22) deals with the points advanced by the unions in their effort to distinguish this Court's opinion in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942). They make, however, two arguments that we had not anticipated. Both are wrong.

First, the unions say in effect that *Williams* is not relevant because there was no "pending demand for an agreement on the subject matter of the change. . . ." (Resp. Br. p. 26). But as the opinion discloses (*id.*, at 394, 396, 402), not only had the employees' representatives demanded an agreement respecting wages, but that was the central issue in dispute. Had the facts been as asserted by respondent, the Court in *Williams* presumably would have disposed of the matter on the incontestible ground that the status quo provision of Section 6 is inapplicable in the absence of a union request for an agreement made under that Section.

Second, the unions seem to believe that the Court's decision respecting Section 2 Seventh and Section 6 turned upon the Court's conclusion that there were individual contracts respecting wages between the carriers and each redcap (Resp. Br. pp. 27-28). In a sense that is so, but not in any sense that helps the unions here. The principle established by the Court, and the principle that is controlling in the case at bar, is that "[t]he prohibitions of § 6 . . . and those of § 2, Seventh are aimed at preventing changes in conditions previously fixed by collective bargaining agreements." 315 U.S., at 402-403. In applying that principle, the Court in *Williams* held that there had been no such changes because there had been no previous collective agreement respecting wages, but only individual agreements. In applying that principle to this case, it is equally clear that the carrier did not propose any changes "in conditions previously fixed by collective bargaining agreements," but on the contrary was exercising its contractual rights.

With respect to respondent's attempt to distinguish *Hilbert v. Pennsylvania R. Co.*, 290 F.2d 881 (7th Cir., 1961), *Rutland Ry. Corp. v. Brotherhood of Locomotive Eng.*, 307 F.2d 21 (2d Cir., 1962), and *Illinois Central R. Co. v. Brotherhood of Railroad Train.*, 398 F.2d 973 (7th Cir., 1968) (Resp. Br. pp. 29-30), see our opening brief at p. 25, n. 11.

contention is a contention that has not been made before in this litigation. The unions contend that the decision below should be affirmed on the ground that the Shore Line violated its statutory duty to bargain (as distinguished from the status quo provision of Section 6) when it established outlying assignments during the pendency of respondent's Section 6 notice. (R.L.E.A. Br. pp. 7-16; Resp. Br. pp. 35-36.) That claim, however, was neither pleaded, proved, nor argued below^{*}; there are no findings of fact that even inadvertently support it; and the record as it exists makes clear that no such findings could properly have been made.

a. The parties' duty to bargain is imposed by Section 2 First of the Railway Labor Act. Section 2 First requires the parties to railway labor disputes—

“to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier. . . .” (45 U.S.C. § 152 First.)

Respondent's Answer and Counterclaim did not allege that the Shore Line had violated Section 2 First; the pleading alleged only that the carrier had violated Section 6 (A. 14, 15, 16). Accordingly, the largely factual question whether the Shore Line exerted “every reasonable effort to make and maintain agreements” has not been litigated. It is not a question as to which either party has offered proof, and it is therefore much too late for the unions to raise it now. “[O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested

^{*} See *California v. Taylor*, 353 U.S. 553, 556-557 n. 2 (1957); *United States v. New York Tel. Co.*, 326 U.S. 638, 650-651 n. 18 (1946).

with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues. ...” *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).⁹

b. Moreover, the claim that the Shore Line has violated its duty to bargain is utterly indefensible in view of facts which are of record. The record shows that the Shore Line has been bargaining with respondent over the establishment of assignments at Trenton since 1961. On February 21, 1961, when the Shore Line initially decided to establish such assignments, it notified respondent before it took action (A. 132, 148). Respondent immediately served the Shore Line with a Section 6 notice requesting an agreement as to the conditions under which the assignments would operate (A. 104, 148). In addition, respondent asked the Shore Line to defer establishment of the new assignments long enough to permit the unions to formulate detailed proposals regarding the matter (A. 133). The Shore Line agreed to that request (A. 133). After respondent had formulated such proposals, the parties negotiated at length, first in conferences, and then in mediation (A. 31-32, 105-109, 135-139, 148-149). After the termination of mediation and the establishment of the Dearoad assignments, the Shore Line made further attempts to negotiate the matter (A. 114). When that failed, respondent withdrew its Section 6 notice, on September 10, 1965, and decided to submit

⁹ The unions do not suggest that the case be remanded for the taking of evidence respecting this issue. Such a suggestion would be unwarranted. The Shore Line has been obliged since 1966 to refrain from establishing outlying assignments pending a final resolution of this litigation. “Considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end” should preclude a remand. Cf. *United States v. Atkinson*, 297 U.S. 157, 159 (1936).

the question to a special board of adjustment. (A. 114.)¹⁰ Then, when the special board of adjustment decided that the Shore Line's agreements with respondent did not prohibit the establishment of outlying assignments (A. 110), the Shore Line promptly revived its plan to establish assignments at Trenton *but again notified the unions first* and invited them to inspect the proposed new facilities for the accommodation of employees at Trenton (A. 140-141). Respondent countered with a new Section 6 notice, the notice immediately involved in this case (A. 112). The parties have conferred with respect to the notice and await the assignment of a mediator (A. 42, 113, 115-119, 125-129, 149). Not until September 19, 1966—when the bunkhouse at Trenton was ready for use and additional switching was required nearby—did the Shore Line finally establish assignments at Trenton (A. 28, 42-43, 52-53, 55, 111, 150).

In view of these facts of record, the unions' new claim that the Shore Line did not bargain enough before it established the Trenton assignments is insupportable. The Shore Line has bargained over the matter for years. It has been scrupulous in giving respondent both the opportunity to be heard and the opportunity to bargain. Its action in establishing the Trenton assignments obviously has not put the issue beyond the reach of further bargaining today. The Shore Line stands ready and willing to engage in such bargaining. In short, the Shore Line has been, is, and plans to continue exerting "every reasonable effort" to settle this dispute by agreement.

¹⁰ Respondent now suggests (Br. p. 33) that it was induced to withdraw its Section 6 notice by the Shore Line's statement to the Mediation Board on February 8, 1963—over 2½ years earlier—that it was "no longer contemplating" the change in tie-up points that had precipitated the original Section 6 notice (A. 137). However, respondent's own communications to the Shore Line demonstrate that in fact respondent withdrew its first Section 6 notice of its own free will, because "Case No. 21 now in SBA will in all probability settle the issue of starting and tying up a crew at other than Lang Yard" (A. 114).

What then do the unions say? At root, they rely, not on the facts respecting the bargaining in this case but on a sweeping interpretation of two decisions of this Court. The *amicus* relies on *Fibreboard Corp. v. Labor Board*, 379 U.S. 203 (1964). Respondent adds *Labor Board v. Katz*, 369 U.S. 736 (1962). This Court's decision in *Fibreboard*, we are told, stands for the proposition that under the National Labor Relations Act (29 U.S.C. §§ 151-168) "a practice which is a condition of employment and so a subject of mandatory bargaining may not be changed without bargaining even though it has not been bargained previously and is not in an agreement" (R.L.E.A. Br. p. 11). *Katz*, we are told, stands for the proposition that under the N.L.R.A. "the duty to bargain collectively carries with it the requirement to refrain from unilateral action, during the bargaining process, with respect to the subject matter being negotiated" (Resp. Br. p. 35). All these supposed *per se* rules under the N.L.R.A., we are told, should be read into Section 2 First of the Railway Labor Act and were violated by the Shore Line (R.L.E.A. Br. pp. 9-14; Resp. Br. p. 36).

There is no part of the unions' argument with which we do not disagree.

i. This Court's decision in *Fibreboard* did *not* hold that a practice that is within the scope of the duty to bargain may not be changed without prior bargaining, although to be sure that is true when such action would preclude meaningful bargaining.¹¹ What the Court held, pursuant to its limited grant of certiorari in that case, was that the contracting out of work involved in the case was a mandatory subject of bargaining because it destroyed a bargaining unit, and that the Labor Board's remedial powers in-

¹¹ Even if *Fibreboard* had so held, the holding would not advance respondent's cause here, for there had been prior bargaining in this case *ad infinitum*.

clude the power to order the restoration of the *status quo ante* following a refusal to bargain when that is necessary "to insure meaningful bargaining." See 379 U.S., at 209, 215, 216. Those holdings have no relevance to any issue involved in this case; there is no dispute as to either matter. Similarly, *Katz* did *not* hold that "the duty to bargain collectively carries with it the requirement to refrain" indefinitely from unilateral action with respect to the subject matter of a dispute. Rather, at least as we read it, the case held that a unilateral change that "foreclosed discussion of [an] issue" (369 U.S., at 747) is not permissible during the pendency of negotiations with respect to that issue. But there is no dispute in this case with respect to that proposition; as we show elsewhere, the Shore Line has not made any change and has not taken action that forecloses discussion.

Contrary to the unions' contentions, neither *Fibreboard* nor *Katz* imposed a *per se* rule prohibiting unilateral action regardless of circumstances, under the N.L.R.A., much less throughout the "long and drawn out" procedures prescribed by the Railway Labor Act.¹² Such cases should not be read as "laying down a hard and fast rule to be mechanically applied regardless of the situation involved." *Sucesion Mario Mercado E. Hijos*, 161 NLRB 696 (1967). *Accord, Shell Oil Co.*, 149 NLRB 305 (1964). On the contrary, both decisions are rooted in the statutory command that parties engage in good faith bargaining—"meaningful bargaining" as *Fibreboard* phrased it. 379 U.S., at 216. Therefore, as we read *Fibreboard* and *Katz*, unilateral action is proper, either before or during negotia-

¹² Nor did any of the Court of Appeals decisions cited by the *amicus* (Br. pp. 12-13). *Per se* rules represent an "intrusion into the substantive aspects of the bargaining process" and at the very least require "specific warrant" from the statute before the Board can add to the Act's prohibitions. *Labor Board v. Insurance Agents*, 361 U.S. 477, 490, 496-497 (1960). Cf. *Labor Board v. American Ins. Co.*, 343 U.S. 395, 409 (1952).

tions, when it does not interfere with meaningful bargaining. Thus, the N.L.R.B. has held unilateral action of a number of kinds to be lawful under various circumstances —e.g., the laying off of employees, *Lasko Metal Prods., Inc.*, 148 NLRB 976 (1964), *enforced*, 363 F.2d 529 (6th Cir., 1966); the setting of production bonus rates on new products, *Frontier Homes Corp.*, 153 NLRB 1070-72 (1965), *enforced in part*, 371 F.2d 974 (8th Cir., 1967); the selling of a business to a buyer who will shut it down, *New York Mirror*, 151 NLRB 834, 841 (1965); the liquidating of a business, *McLoughlin Mfg. Corp.*, 164 NLRB No. 23 (1967); the selling of one plant and transfer of work to a distant plant, *Fruehauf Trailer Co.*, 162 NLRB 195 (1967); and the subcontracting of work, *Hartmann Luggage Co.*, 145 NLRB 1572, 1573 (1964); *Sucesion Mario Mercado E. Hijos*, 161 NLRB 696 (1967); *American Oil Co.*, 155 NLRB 639, 650 (1965).¹³ The facts of this case, summarized above, demonstrate that the Shore Line's "unilateral" action did not "foreclose discussion" (*Katz*, 369 U.S., at 747) or

¹³ To take still more examples, the N.L.R.B. has held that employers did not violate the duty to bargain when, prior to impasse, they implemented work rules concerning duties "within the normal area of detailed day-to-day operating decisions relating to the manner in which the work is to be performed." *Little Rock Downtowner, Inc.*, 148 NLRB 717, 719 (1964). In *Miller Brewing Co.*, 166 NLRB No. 90 (1967), the Board even acknowledged that "it may be impractical to require that no plant rules issue until a union has had the opportunity to bargain." And in *Westinghouse Electric Corp.*, 156 NLRB 1080 (1965), *enforced*, 369 F.2d 891 (4th Cir., 1966), the Board said "[B]ecause of the nature of the restaurant business . . . it is impracticable to require consultation with a union before each change in the price of any products sold. It is sufficient compliance with the statutory mandate, we believe, if management honors a specific union request for bargaining about changes made or to be made." When, as here, there is extensive bargaining either before or after the change, the Board is even more likely to approve the unilateral change. See *Fruehauf Trailer Co.*, *supra*; *Sucesion Mario Mercado E. Hijos*, *supra*; *Georgia-Pacific Corp.*, 150 NLRB 885 (1965); *Hartmann Luggage Co.*, *supra*; *Shell Oil Co.*, *supra*; *Lasko Metal Prods. Inc.*, *supra*; *McLoughlin Mfg. Corp.*, *supra*; *New York Mirror*, *supra*. See also *Hilton Mobile Homes*, 155 NLRB 873, 874 (1966), *aff'd*, 387 F.2d 7 (8th Cir., 1967).

interfere with "meaningful bargaining" (*Fibreboard*, 379 U.S., at 216). The Shore Line's action therefore was permissible under those decisions.

ii. Even if we were wrong in saying that *Fibreboard* and *Katz* did not lay down *per se* rules forbidding unilateral action pending negotiations, under the N.L.R.A., such rules nevertheless would have no place under the Railway Labor Act. This Court has cautioned against indiscriminate adoption of the N.L.R.A. rules in Railway Labor Act cases. Labor-management relations in the railroad industry have "developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act" *Trainmen v. Chicago, R. & I. R. Co.*, 353 U.S. 30, 31-32 n. 2 (1957). "[T]he National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 383 (1969). Those cautionary statements should be heeded here, for at least three reasons:

In the first place, it is one thing for a specialized administrative agency like the N.L.R.B. to lay down *per se* rules to insure meaningful bargaining under the N.L.R.A. It would be quite another thing, however, for the nation's courts to set themselves up in the business of fashioning such rules to guarantee compliance with the requirement of Section 2 First of the Railway Labor Act that parties to railway labor disputes exert every reasonable effort to make and maintain agreements. As this Court said last Term, "Even if the task of adopting the NLRA's principles to railway disputes could be managed and implemented by an agency with administrative expertise . . . Congress has

invested no agency with even colorable authority to perform this function . . . [and] we lack the expertise and competence to undertake this task ourselves." *Railroad Trainmen v. Terminal Co.*, *supra*, 394 U.S., at 391-392.

In the second place, it may be justifiable to impose a *per se* ban on unilateral action pending the relatively brief negotiations under the N.L.R.A. But for reasons already indicated, it would be quite indefensible to impose similar restrictions throughout the "purposely long and drawn out" procedures prescribed by the Railway Labor Act. See pp. 8-9, *supra*.

In the third place, importing a *per se* rule of the kind advocated by the unions into the railway labor arena would do violence to Section 6 of the Railway Labor Act. The *Fibreboard* duty-to-bargain argument advanced by the *amicus* is premised upon the Railway Labor Act's duty to bargain provision—Section 2 First (R.L.E.A. Br. pp. 9-10). But Section 2 First applies at all times, whether or not a Section 6 notice is pending and whether or not action is contemplated that is permitted under existing agreements. Therefore, the *amicus* has concluded, with impeccable logic, that under its interpretation of *Fibreboard*, a carrier must serve a notice before it changes a working condition even if the contemplated action is permissible under existing agreements so that no change in agreements is needed. (R.L.E.A. Br. p. 16). But while the *amicus* thus would require the service of a Section 6 notice even when the intended change does not require any "change in agreements," Section 6 provides for service of a notice of intended change only if the change is "an intended change in agreements." See *St. Louis, S.F. & T. Ry. Co. v. Railroad Yardmasters*, 328 F. 2d. 749, 753 (5th Cir., 1964). So, too, while the *amicus* would require continuation of so-called "working conditions" whether or not a Section 6 notice has been served or the Mediation Board has inter-

vened, Section 6 requires preservation of "working conditions" only in cases "where such notice of intended change has been given," etc. Thus, the argument of the *amicus* would repeal all the express limitations stated in Section 6.

In sum, the unions' new contentions as to the duty to bargain are not properly before this Court and are utterly lacking in merit.

4. *Application of the unions' interpretation of Section 6.* We deem it appropriate to mention one additional matter with respect to the unions' contentions. Under our interpretation of Section 6, if action is permitted under a railway labor contract, it remains permitted during the pendency of a proposal to change the contract. If action is not permitted under the contract, it remains prohibited after expiration, during negotiations for change. That is a workable test for determining the application of the status quo provision of Section 6.

The same cannot be said of the unions' contentions. The injunction entered by the District Court permits the Shore Line to operate outlying assignments at Dearoad, but not at other points (A. 154-155.) Why? Neither the courts below, nor the unions, offer us any clue. While the unions apparently are of the view that the status quo provision of Section 6 freezes certain physical facts existing at the moment when a Section 6 notice is served, they do not tell us how to determine *which* facts are frozen. When the Section 6 notice involved in this case was served in 1966, the Shore Line was operating outlying assignments. Such assignments had been operated at Dearoad but not at Trenton since 1962 and 1963.¹⁴ How did the courts below

¹⁴ The Shore Line's first outlying assignment in recent years was established at Dearoad, according to the record, in 1962 (A. 33, 36). A second outlying assignment was established at Dearoad by bulletin dated September 24, 1963 (A. 110). That assignment became the subject of Award No. 21 by Special Board of Adjustment No. 375 (A. 110).

conclude, and why do the unions contend, that the "status quo" fails to include the one such physical fact (operation of outlying assignments) but includes another such fact (operations at Dearoad but not at Trenton)? In two opinions, and two briefs on the merits in this Court, there is nothing that suggests how to choose among such facts in determining the status quo.¹⁵

The truth of the matter is that there is no rational basis for choosing among the facts that may happen to exist at the moment when a Section 6 notice is served and saying that some such facts are frozen and others are not. In these circumstances, the approach advocated by the unions can only produce wholly arbitrary results. Nothing of this kind was contemplated when the Railway Labor Act was enacted. Rather, as this Court held in *Williams v. Terminal Co.*, 315 U.S. 386, 402-403 (1942), "[t]he institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibitions of § 6 against change of wages or conditions pending bargaining and those of § 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agreements."

¹⁵ One thing, at least, is clear. It is not hardship to the employees that determines the issue in the unions' view. Trenton is 30-33-35 miles north of the Shore Line's principal yard in Toledo, while Dearoad is another 10-15 miles up the line (A. 56). Thus, moving outlying assignments from Dearoad to Trenton imposes no hardship on employees. If anything, it advantages them.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment below should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 29.—OCTOBER TERM, 1969

The Detroit and Toledo Shore
Line Railroad Company,
Petitioner,
v.
United Transportation Union.

On Writ of Certiorari
to the United States
Court of Appeals for
the Sixth Circuit.

[December 9, 1969]

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises a question concerning the extent to which the Railway Labor Act of 1926¹ imposes an obligation upon the parties to a railroad labor dispute to maintain the status quo while the "purposely long and drawn out"² procedures of the Act are exhausted. Petitioner, a railroad, contends that the status quo which the Act requires be maintained consists only of the working conditions specifically covered in the parties' existing collective agreement. Respondent, a railroad brotherhood, contends that what must be preserved as the status quo are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing collective agreement. For the reasons stated below, we think that only the union's position is consistent with the language and purposes of the Railway Labor Act.

The facts involved in this case are these: The main line of the Detroit and Toledo Shore Line (Shore Line), petitioner's railroad, runs from Lang Yard in Toledo, Ohio, 50 miles north to Dearoad Yard near Detroit, Michigan. For many years prior to 1961, Lang Yard was the

¹ 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*

² *Railway Clerks v. Florida E. C. R. Co.*, 384 U. S. 238, 246 (1966).

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terminal at which all train and engine crews reported for work and from which they left at the end of the day. As the occasions arose, the Shore Line transported crews from Lang Yard to perform switching and other operations at various points to the north, assuming the costs of transportation and overtime for the crew members. On February 21, 1961, the railroad advised respondent, the Brotherhood of Locomotive Firemen and Enginemen (BLF&E),³ of its intention to establish "outlying work assignments"⁴ at Trenton, Michigan, a point on the main line about 35 miles north of Lang Yard. These new assignments would have required many employees to report for work at Trenton rather than Lang Yard where they had been reporting. The BLF&E responded to this announcement by filing a notice under § 6 of the Railway Labor Act⁵ proposing an amendment to the collective

³ The United Transportation Union, the successor organization to the Brotherhood of Locomotive Firemen and Enginemen, was substituted as party respondent by order of the Court, March 3, 1969. Respondents also include two officers of the BLF&E named in the original complaint.

⁴ The parties treat the term "outlying assignment" as meaning a work assignment with a reporting point for going on and off duty located elsewhere than at the Shore Line's principal yard, Lang Yard in Toledo, Ohio. We adopt that usage here.

⁵ 44 Stat. 582, as amended, 45 U. S. C. § 156 (1964). Section 6, in its entirety, provides:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been

bargaining agreement to cover the changed working conditions of the employees who would work out of Trenton. Section 6 requires both carriers and unions to give the other party a 30-day notice of an "intended change in agreements affecting rates of pay, rules, or working conditions."⁶ Since the union thus invoked the "major disputes" settlement procedures of the Railway Labor Act,⁷ the dispute first went to conference and, when the parties failed to agree between themselves, then to the National Mediation Board.

While the case was pending before the National Mediation Board, the Shore Line announced two new outlying assignments at Dearoad, Michigan, at the northern end of the line. Because work crews could be taken by cab from Dearoad south to Trenton, the railroad concluded that it no longer needed to establish assignments at Trenton and so advised the Mediation Board. When the Dearoad assignments were announced, the union withdrew from the Mediation Board proceedings, and before a Special Board of Adjustment convened under § 3 of the Act,⁸ challenged the railroad's right under the parties' collective agreement to establish outlying assignments.

finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

⁶ See n. 5, *supra*.

⁷ A "major dispute" is one arising out of the formation or change of collective agreements covering rates of pay, rules, or working conditions. *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 722-727 (1945).

⁸ 44 Stat. 578, as amended, 45 U. S. C. § 153 (1964). At this point, the BLF&E was considering the controversy as a "minor dispute," i. e., a dispute arising out of the interpretation or application of collective agreements. Under § 3 of the Railway Labor Act such disputes are settled by an Adjustment Board whose interpretation of the collective agreement is binding on the parties. See *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 722-727 (1945).

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On November 30, 1965, the Special Board ruled that the Shore Line-BLF&E agreement did not prohibit the railroad from making the assignments.⁹

Relying in part on the ruling of the Special Board, the railroad notified the union on January 24, 1966, that it was reviving its plan for work assignments at Trenton. Again the union responded by filing a § 6 notice of a proposed change in the parties' collective agreement. This time the union sought to amend the agreement to forbid the railroad from making any outlying assignments at all. The parties were again unable to negotiate a settlement themselves, and on June 17, 1966, the union invoked the services of the National Mediation Board. While the Mediation Board proceedings were pending, the railroad posted a bulletin definitely creating the disputed work assignments at Trenton effective September 26, 1966. Faced with this unilateral change in working conditions, the union threatened a strike. The railroad then brought this action in the United States District Court to enjoin the BLF&E¹⁰ from calling the carrying out the allegedly illegal strike. The union counterclaimed for an injunction prohibiting the Shore Line from establishing outlying assignments on the ground that the status quo provision of § 6 of the Railway Labor Act forbids a carrier from taking

⁹ The Special Board of Adjustment found:

"What took place here was not a change in the recognized terminal, but simply amounted to an outlying assignment. There is nothing in the rules of agreement which precludes this carrier from establishing an outside assignment." App., at 110.

¹⁰ The Brotherhood of Railroad Trainmen were also named as defendants, as were several officers of both unions. The causes of action against the two brotherhoods were completely different, however, and the cases were treated as distinct at trial and on appeal. The Brotherhood of Railroad Trainmen is not involved in the present litigation at this stage.

unilateral action altering "rates of pay, rules, or working conditions" while the dispute is pending before the National Mediation Board. The pertinent part of § 6 provides:¹¹

"In every case where . . . the services of the Mediation Board have been requested by either party . . . , rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . by the Mediation Board" 45 U. S. C. § 156 (1964).

The District Court dismissed the railroad's complaint, from which no appeal has been taken, but it granted the injunction sought by the union restraining the railroad from establishing any new outlying assignments at Trenton or elsewhere.¹² The United States Court of Appeals for the Sixth Circuit affirmed the issuance of the injunction against the railroad. 401 F. 2d 368 (1968). We granted certiorari, 393 U. S. 1116 (1969).

In granting the injunction the District Court held that the status quo requirement of § 6 prohibited the Shore Line from making outlying assignments even though there was nothing in the parties' collective agreement which prohibited such assignments. The Shore Line vigorously challenges this holding. It contends that the purpose of the status quo provisions of the Act is to guarantee only that existing collective agreements continue to govern the parties' rights and duties during efforts to change those agreements. Therefore, the railroad argues, what Congress intended by writing in § 6 that "rates of pay, rules, or working conditions shall

¹¹ The full section is set out in n. 5, *supra*.

¹² The order of the District Court is unreported. *Detroit and Toledo Shore Line Railroad Co. v. Brotherhood of Locomotive Firemen and Enginemen*, No. C 66-207 (D. C. N. D. Ohio, filed Nov. 15, 1966). The opinion of the District Court on motion to vacate the judgment is reported at 267 F. Supp. 572 (1967).

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not be altered" was that rates of pay, rules, or working conditions *as expressed in an agreement* shall not be altered. And since nothing in the railroad's agreement with the union precluded the railroad from altering the location of work assignments, this working condition was not "expressed in an agreement." Thus, the argument runs, the railroad could make outlying assignments without violating the status quo provision of § 6, and the judgments below must be reversed.

We note at the outset that the language of § 6 simply does not say what the railroad would have it say. Instead, the section speaks plainly of "rates of pay, rules, or working conditions" without any limitation to those obligations already embodied in collective agreements. More important, we are persuaded that the railroad's interpretation of this section is sharply at variance with the overall design and purpose of the Railway Labor Act.

The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce.¹³ The problem of strikes was considered to be particularly acute in the area of "major disputes," those disputes involving the formation of collective agreements and efforts to change them. *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 722-726 (1945). Rather than rely upon compulsory arbitration, to which both sides were bitterly opposed, the railroad and union representatives who drafted the Act chose to leave the settlement of major disputes entirely to the processes of noncompulsory adjustment. *Id.*, at 724. To this end, the Act established rather elaborate machinery for negotiation, mediation, volun-

¹³ In *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, 565 (1930), the Court said: "The Brotherhood insists, and we think rightly, that the major purpose of Congress in passing the Railway Labor Act was 'to provide the machinery to prevent strikes.'"

tary arbitration, and conciliation. *General Committee, B. L. E. v. Missouri-K.-T. R. Co.*, 320 U. S. 323, 328-333 (1943). It imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted.¹⁴ *Railroad Trainmen v. Terminal Co.*, 394 U. S. 369, 378 (1969); *Elgin, J. & E. R. Co. v. Burley*, *supra*, at 721-731; *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, 565-566 (1930). A final and crucial aspect of the Act was the power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process. As we noted in *Railway Clerks v. Florida E. C. R. Co.*, 384 U. S. 238, 246 (1966), "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."

¹⁴ The Act's major dispute procedures and status quo requirement were concisely stated in an opinion by Mr. JUSTICE HARLAN only last Term, *Railroad Trainmen v. Terminal Co.*, 394 U. S. 369, 378 (1969):

"The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the status quo. §§ 2 Seventh, 5 First, 6, 10."

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The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

There are three status quo provisions in the Act, each covering a different stage of the major dispute settlement procedures. Section 6, the section of immediate concern in this case, provides that "rates of pay, rules, or working conditions shall not be altered" during the period from the first notice of a proposed change in agreements up to and through any proceedings before the National Mediation Board.¹⁵ Section 5 First, provides that for 30 days following the closing of Mediation Board proceedings "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose," unless the parties agree to arbitration or a Presidential Emergency Board is created during the 30 days.¹⁶ Finally, § 10

¹⁵ Section 6 is set out in its entirety in n. 5, *supra*.

¹⁶ Section 5 First, 44 Stat. 580, as amended, 45 U. S. C. § 155 First (1964), provides in part:

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter,

provides that after the creation of an Emergency Board and for 30 days after the Board has made its report to the President, "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."¹⁷ These provisions must be read in conjunction with the implicit status quo requirement in the obligation imposed upon both parties by § 2 First, "to make every reasonable effort" to settle disputes without interruption to interstate commerce.¹⁸

unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

¹⁷ Section 10, 44 Stat. 586, as amended, 45 U. S. C. § 160 (1964), provides in part:

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

¹⁸ Section 2 First, 44 Stat. 577, as amended, 45 U. S. C. § 152 First (1964), provides:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The relationship between the status quo provisions and § 2 First, was made explicit in the testimony of Donald Richberg who spoke as the unions' representative when the proposed railroad legislation was presented to Congress jointly by the railroads and the unions:

"As to maintaining the status quo from the time that a dispute is engendered, it is a violation of the duties imposed by this law for either party to take any action to arbitrarily change the conditions until that dispute has been adjusted in accordance with the law. Their primary duty is to exert every reasonable effort to avoid

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While the quoted language of §§ 5, 6, and 10 is not identical in each case, we believe that these provisions, together with § 2 First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day "cooling-off" period. Although these three provisions are applicable to different stages of the Act's procedures, the intent and effect of each is identical so far as defining and preserving the status quo is concerned.¹⁹ The obligation

interruptions of commerce through disputes. The 'reasonable efforts' are set forth here that all disputes shall be considered and decided in conferences, if possible; that, second, if conference fails a certain type of disputes shall be carried to the board of adjustment; the other type of disputes, or those not decided by the board of adjustment, may be carried to the board of mediators, and it shall be the duty of the board of mediators to act." Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926), at 92-93.

¹⁹ This interpretation of the status quo provisions is supported by the legislative history of the Act. See, *e. g.*, the testimony of Donald Richberg set out in n. 19, *supra*. Mr. Richberg, also testified:

"... [T]he only thing that can provoke an arbitrary action (referring to strikes) is the power to arbitrarily change the rates of pay or rules or working conditions before the controversy is settled, and it is provided that they shall not be altered during entire period of utilization of this law." Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926), at 93-94.

Moreover, when the status quo provision of § 5 was added to that section in 1934, its purpose was to provide continuity between §§ 6 and 10 by preserving the status quo for 30 days following the end of proceedings before the Mediation Board. Joseph B. Eastman, Federal Co-ordinator of Transportation, the principal draftsman and proponent of the 1934 amendments, testified:

"As the present act reads, a railroad, by rejecting the Board of Mediation's final recommendation to arbitrate the dispute, is enabled to change the rates of pay, rules, or working conditions arbitrarily, prior to the issuance of an order by the President appointing a fact-finding board and maintaining the status quo for 30 days. . . . The

of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.²⁰

It is quite apparent that under our interpretation of the status quo requirement, the argument advanced by the Shore Line has little merit. The railroad contends that a party is bound to preserve the status quo in only those working conditions covered in the parties' existing collective agreement, but nothing in the status quo provisions of §§ 5, 6, or 10 suggests this restriction. We have stressed that the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be

railroads have taken advantage of this unintentional hiatus in the present law in several instances. The change now proposed is designed to plug this hole." Hearings on S. 3266 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., at 21 (1934).

²⁰ The status quo provision of § 10 was the only one discussed in any depth at the 1926 congressional hearings on the bill. Donald Richberg, n. 19, *supra*, testified as follows when questioned about the intended scope of the status quo provision:

"The thought was to include in the broadest way all the factors which contributed to what is commonly called the status quo. In other words, the conditions may depend upon the dispute, whether it is with regard to rules or with regard to wages." Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926), at 44.

"What broader phrase could be used than 'conditions out of which the dispute arose' which comprehends all the elements affecting the controversy? It is intended to make it clear that the parties are going to have to wait and give the Government full opportunity to adjust the controversy." Hearings on S. 2306 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. (1926), at 88-89.

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covered in an existing agreement. Thus, the mere fact that the collective agreement before us does not expressly prohibit outlying assignments would not have barred the railroad from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions. Here, however, the dispute over the railroad's establishment of the Trenton assignments arose at a time when actual working conditions did not include such assignments. It was therefore incumbent upon the railroad by virtue of § 6 to refrain from making outlying assignments at Trenton or any other place in which there had previously been none, regardless of the fact that the railroad was not precluded from making these assignments under the existing agreement.²¹

The Shore Line's interpretation of the status quo requirement is also fundamentally at odds with the Act's primary objective—the prevention of strikes. This case provides a good illustration of why that is so. The goal of the BLF&E was to prevent the Shore Line from making outlying assignments, a matter not covered in their existing collective agreement. To achieve their goal, the union invoked the procedures of the Act. The railroad, however, refused to maintain the status quo and, instead, proceeded to make the disputed outlying assignments. It could hardly be expected that the union would sit idly by as the railroad rushed to accomplish the very result the union was seeking to prohibit by agreement. The union undoubtedly felt it could resort to self-help if the railroad could, and, not unreasonably, it threatened to strike. Because the railroad prematurely resorted to self-help, the primary goal of the Act came very close to being defeated. The example of this case could no

²¹ See n. 9, *supra*.

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doubt be multiplied many times. It would be virtually impossible to include all working conditions in a collective bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others.²² When the union moves to bring such a previously uncovered condition within the agreement, it is absolutely essential that the status quo provisions of the Act apply to that working condition if the purpose of the Act is to be fulfilled. If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively.²³

We now turn to answer some of the arguments advanced by the Shore Line in support of its position. The first of these involves § 2 Seventh, of the Act. That section forbids a carrier from changing "the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act."²⁴ (Emphasis added.) The Shore Line argues

²² Brief of Railway Labor Executives' Association as *amicus curiae*, at 17.

²³ Respondent BLF&E has urged in its brief that we also consider the question whether the Shore Line violated a duty to bargain in good faith, citing *Fibreboard Corp. v. NLRB*, 379 U. S. 203 (1964), and *NLRB v. Katz*, 369 U. S. 736 (1962). Deciding the case as we do under the status quo provisions of the Act, we find it unnecessary to reach this argument.

²⁴ Section 2 Seventh, 48 Stat. 1188, 45 U. S. C. § 152 Seventh (1964), provides as follows:

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act."

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that this section is a status quo provision and that the "as embodied in agreements" restriction it contains should be read into the status quo provision of §§ 5, 6, and 10. We find no merit in this argument. Section 2 Seventh, which was added to the Act in 1934, does not impose any status quo duties attendant upon major dispute procedures. It simply states one category of cases in which those procedures must be invoked. The purpose of § 2 Seventh, is twofold: it operates to give legal and binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures. The violation of this section is a criminal offense punishable by imprisonment or fine or both.²⁵ Violations of the status quo provisions of §§ 5, 6, and 10 are only civil wrongs.

Second, the Shore Line contends that the interpretation of § 6 which we adopt today is at variance with the position we have taken on two previous occasions, citing *Order of Conductors v. Pitney*, 326 U. S. 561 (1946), and *Williams v. Terminal Co.*, 315 U. S. 386 (1942). Although these cases do contain statements which out of context tend to support petitioner's position, neither dealt with the question we have before us today. *Pitney* involved a suit brought by a union to enjoin the reorganization trustees of a bankrupt railroad from transferring certain job assignments to another union. The plaintiff's contention was that the disputed jobs belonged to its members by both custom and agreement. The trustees were therefore prohibited from reassigning the jobs, the union argued, since they had never filed the appropriate notice of "intended change in agreements" required by § 6. The railroad disputed that the reassignments of the jobs would require a "change in agree-

²⁵ Railway Labor Act, § 2 Tenth, 48 Stat. 1189, 45 U. S. C. § 152 Tenth (1964).

ments" and thus put the meaning of the parties' agreements in issue. We held that the proper forum for interpreting the agreements was the Adjustment Board provided by Congress in the Railway Labor Act, § 3 First (i), for that purpose, and directed the District Court to stay its proceedings accordingly. 326 U. S., at 367-368. Thus, *Pitney*, at most, involved a question of the necessity of filing a § 6 notice and was not at all concerned with the status quo provision of that section.

The *Williams* case is equally inapposite. In that case "redcaps" brought suit through their union representative against the Dallas railroad terminal to recover wages allegedly owed them and retained by the terminal in violation of the Fair Labor Standards Act and the Railway Labor Act. The redcaps' argument under the Fair Labor Standards Act was that Congress had not intended that tips be included in their wages for purposes of satisfying minimum wage requirements. Yet, that is what the terminal had done under its "accounting and guarantee" plan from October 1938, when the F. L. S. A. became effective, until March 1940. The majority of the Court rejected the redcaps' argument, holding that the F. L. S. A. neither prohibited nor required the inclusion of tips within wages. The question was held to be one for contract between the parties. 315 U. S., at 407-408. The redcaps' claim under the Railway Labor Act was that the terminal's "accounting and guarantee" plan under which tips were considered as part of wages was put into operation unilaterally by the terminal on the effective date of the F. L. S. A., despite the fact that the redcaps had two weeks earlier asked for a conference to negotiate an agreement which would include the subject of wages. This, the redcaps argued, violated the status quo provisions of § 6 since prior to the F. L. S. A. tips had not been included in wages. The Court concluded, however, that § 6 was not applicable to the

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dispute between the parties. The Court reasoned that when the redcaps continued to work after being individually notified of the "accounting and guarantee" plan, new and independent contracts were formed between each redcap and the terminal. The Court held that these contracts were not affected by the pending request for collective bargaining under the Railway Labor Act. The decision rested partially on the ground that "independent individual contracts are not affected by the Act." 315 U. S., at 399-400. And the Court also said more narrowly that the status quo requirements of § 6 were inapplicable since that section only applies when a "change in agreements" is involved. 315 U. S., at 400. In *Williams* there was absolutely no prior history of any collective bargaining or agreement between the parties on any matter. Without pausing to comment upon the present vitality of either of these grounds for dismissing the redcaps' Railroad Labor Act claim, it is readily apparent that *Williams* involved only the question of whether the status quo requirement of § 6 applied at all. The Court in *Williams* therefore never reached the question of the scope of the status quo requirement in a dispute, such as the one before the Court today, to which that requirement concededly applies.

Finally, the Shore Line points out, quite correctly, that its position on § 6 is identical to that taken by the National Mediation Board in several of its Annual Reports.²⁶ However, the Mediation Board has no ad-

²⁶ The 1968 National Mediation Board Annual Report stated:

"Section 6 states that where notice of intended change in agreement has been given, rates of pay, rules, and working conditions as expressed in the agreement shall not be altered by the carrier until the controversy has been finally acted upon in accordance with specified procedures." (Emphasis added.) NMB, 34th Ann. Rep. 23 (1968). See also NMB, 33d Ann. Rep. 36 (1968); 31st Ann. Rep. 25 (1966).

judicatory authority with regard to major disputes, nor has it a mandate to issue regulations construing the Act generally. Certainly there is nothing in the Act which can be interpreted as giving the Mediation Board the power to change the plain, literal meaning of the statute, which would be the result were we to adopt its interpretation of § 6.

The judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 29.—OCTOBER TERM, 1969

The Detroit and Toledo Shore Line Railroad Company, Petitioner, v. United Transportation Union.	} On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
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[December 9, 1969]

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I fully agree that the application of § 6 should not be restricted to only those terms of employment that the parties have seen fit to embody in a written agreement. Section 6 may properly, in some circumstances, be extended to "freeze" *de facto* conditions of employment. I cannot, however, accept what appears to be the majority's test for determining when a § 6 freeze is appropriate.¹ Any work practice is, in the words of the majority, an "actual, objective working condition." But the practice of today may not be the accepted condition of yesterday, but rather a temporary expedient in which neither party acquiesces. I find it difficult to think that Congress intended that either party, by serving a § 6 notice, should be able to shackle his adversary and tie him to a condition that has been historically and consistently controverted.

Rather, what persuades me to countenance the extension of § 6 beyond the terms of a written collective bargaining agreement is the fact, observed by the Court, that "when a condition is satisfactorily tolerable to both

¹ The majority first announces a test looking to "actual, objective working conditions," *ante*, p. 11. This is later qualified by a durational requirement, but no general principle of decision is set forth.

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sides, it is often omitted from the agreement . . . ,” ante 13. Taking this observation as a point of departure, I favor a more subjective approach than the objective and mechanical one implicit in the majority’s language. The question that should be asked is whether in the context of the relationship between the principals, taken as a whole, there is a basis for implying an understanding on the particular practice involved. To this end it is necessary to consider not only the duration of the practice but all the dealings between the parties, as for example, whether the particular condition has been the subject of prior negotiations.

While I recognize, of course, that any subjective test is not easily applied, I cannot subscribe to a rule that may have the incongruous effect of perpetuating what both parties in fact view as a disputed practice, simply because neither party, for reasons of convenience, has not exercised a recognized option of resorting to self-help.

Under this standard I consider that the proper disposition of the case before us is to remand to the District Court for additional findings.² While the District Court found that “for many years prior to 1961” Lang Yard was the established terminal point for reporting to duty, that finding alone would not satisfy a subjective test in light of subsequent events that may have negated any understanding that might have existed prior to 1961.³ In 1961 the Shore Line advised the Union of a contemplated shifting of reporting to its Trenton terminal

² While the District Court and the Court of Appeals both properly rejected petitioner’s theory, restricting § 6 to terms embodied in a written agreement, it is by no means clear to me precisely what standard they followed in concluding that the Act was applicable.

³ The District Court, as I read its findings, does not appear to have considered the possible impact of the train of events revealed by the record in connection with 1961–1963 proceedings before the Board.

some 30 miles north. The proposal apparently met with employee resistance and the Union served a § 6 notice seeking to modify the agreement with the railroad. By 1963 the parties had exhausted the statutory mediation route without reconciling their differences and the Mediation Board recommended arbitration to break the impasse. This proposal was rejected by the Company which declared the dispute moot since, by that time, it had abandoned its Trenton project. Meanwhile, the Company embarked on a practice of transporting employees at its own expense and on company time from its Dearoad terminal, 11 miles north of Lang Yard, to Trenton, a practice which is the subject of a separate § 6 notice.

In my opinion a remand is called for to determine whether the Company's voluntary abandonment of its Trenton project, coupled with its undertaking to transport employees from Dearoad at its own cost and the long-established practice prior to 1961, amounted to acceptance in principle of Lang Yard as the reporting location.

For that reason I respectfully dissent from the Court's affirmance of the Court of Appeals.